Supreme Court, U.S.
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No. 04- ____

In the Supreme Court of the United States

TOM R. PABST,

Petitioner,

v.

CITY OF FLINT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

TOM R. PABST
Counsel of Record

MICHAEL A. KOWALKO
2503 S. LINDEN ROAD
FLINT, MI 48532
(810) 732-6792

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

Every citizen of the United States should have the due process rights embodied in Federal Rule of Criminal Procedure 42 applied to them equally and consistently. However, the Federal Circuits do not apply the specific procedural due process notice requirements of Federal Rule of Criminal Procedure 42 consistently, and further, the Sixth Circuit Court of Appeals does not apply it consistently within its own circuit. Specifically, Federal Rule of Criminal Procedure 42(b) has exacting procedural due process notice requirements that some circuits apply strictly while others do not.

This Court has also consistently applied the First Amendment to protect persons from restraints against the publication of truthful information contained in official court records open to public inspection. The Sixth Circuit disagrees however, and now permits a federal district court to enjoin a state court attorney from using a document which was already a part of the state court public record in state court proceedings.

Federal Courts are Article III Courts and therefore either have subject matter jurisdiction or they do not have it. The Sixth Circuit Court of Appeals has created subject matter jurisdiction where none exists by making its own conclusive findings of fact that are directly opposite of the findings of the district court without showing "clear error" as required by the proper appellate standard.

The questions presented, therefore, are:

(1) When construing Federal Rule of Criminal Procedure 42, should the specific procedural due

process "notice" requirements be applied the same amongst and within all federal circuits?

(2) Is the use of an unsealed document which was already part of a state court public record in a state court proceeding protected by the United States Constitution, including specifically the First Amendment, from a federal district court's injunction/restraint upon the use of said document by the device of criminal sanctions against the state court attorney?

(3) Can a federal circuit court create subject matter jurisdiction where none exists by making a conclusive finding of fact directly opposite of the finding of the district court without showing clear error pursuant to the proper appellate standard?

PARTIES TO THE PROCEEDING

The petitioner, attorney Tom R. Pabst, was not a party nor an attorney involved in the original case of *Elizabeth Banner v. City of Flint and Carl Hamilton*, which case settled in October of 2000. An injunction was issued on December 8, 2000 by the District Court. The injunction was applied against attorney Pabst by the District Court, which subsequently led to consolidated appeals in the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Tom R. Pabst, the Petitioner, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The two opinions and orders of the United States District Court at issue are reproduced at Appendix C and Appendix D. The April 8, 2004 Sixth Circuit Court of Appeals opinion is unreported. Appendix B. The April 28, 2004 Order of the Sixth Court denying petitioners timely request for rehearing remains unreported. Appendix A.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on April 8, 2004. The jurisdiction of the federal circuit was invoked pursuant to Federal Rule of Appellate Procedure 3 and 28 USC §1331. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1) and Supreme Court Rule 10(a)-(c)

RELEVENT PROVISIONS

The Due Process clause of the U.S. Constitution states, in pertinent part:

> "No person shall be...deprived of life, liberty or property without due process of law...".Fifth Amendment, U.S. Constitution.

Federal Rule of Criminal Procedure 42(b), as amended March 9, 1987, effective August 1, 1987, stated:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided by these rules. If the contempt charged involves disrespect or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

The First Amendment of the U.S. Constitution states:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble and to petition the government for a redress of grievances."

Article III of the U.S. Constitution states, in pertinent part:

"Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

***

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more states; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.".

STATEMENT

A. FEDERAL RULE OF CRIMINAL PROCEDURE 42(b) AND PROCEDURAL DUE PROCESS

In order to find someone guilty of criminal contempt under Federal Rule of Criminal Procedure 42(b)[1], the Sixth Circuit Court of Appeals has previously stated that, "these specific procedures concerning notice must be followed," and that, "the notice requirement upholds basic elements of due process."[2] In the case at bar; however, the Sixth Circuit applied a different standard which did not require Federal Rule of Criminal Procedure 42(b)'s specific procedural notice requirements to be followed.[3]

At least one other Circuit has held that a criminal contempt conviction could be sustained despite the fact that 42(b)'s requirements were not followed.[4]

Thus, the procedural due process protections of 42(b)'s specific requirements regarding notice are being inconsistently applied not only amongst different circuits but within individual circuits.

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[1] FRCP 42(b) has been amended April 29, 2002, and is now essentially embodied in Federal Rule of Criminal Procedure 42(a). Because the Sixth Circuit referred to it as 42(b) in its opinion, it shall be hereinafter be referred to as 42(b) for ease of reference in this Brief.

[2] *In Re Smothers*, 322 F.3d 438, 441 (6th Cir. 2002) and *Downey v. Clauder*, 30 F.3d 681,686 (6th Cir. 1994).

[3] See Appendix B, at pages 22a, 23a.

[4] *U.S. v. Onu*, 730 F.2d 253, 255-56 (5th Cir. 1984).

B. FIRST AMENDMENT

In cases involving the publishing of speech protected by the 1st Amendment, this Court has consistently held that a person can't be punished for the publication of truthful information contained within documents which were already a part of the public record.[5] This Court has also been consistently against the use of prior restraints in violation of fundamental 1st amendment speech rights.[6]

The Sixth Circuit Court of Appeals in this case; however, upheld a criminal contempt finding against a state court attorney for using an unsealed state court public document in state court proceedings. Appendix B, pg. 23a-24a, RE 110, sub exhibit 16 to exhibit 1.

C. SUBJECT MATTER JURISDICTION

In order for a federal district court to even arguably have subject matter jurisdiction over a non-party concerning an injunction, the non-party must be "in active concert or participation with them who received actual notice of the order by personal service or otherwise." FRCP 65(d). The district court in this case specifically found that, "there is no evidence that Pabst has or is acting in active concert or participation with Plaintiff's counsel...". Appendix D at pages 46a-47a. Notwithstanding this specific finding of fact, the Sixth Circuit created subject matter jurisdiction where none existed by making a conclusive finding of fact that, "...we find that Pabst was both in active concert and participation

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[5] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

[6] *Near v. Minnesota*, 283 U.S. 697, 714-717 (1931); *New York Times v. U.S.*, 403 U.S. 713-14 (1971), and *Nebraska Press Association v. Stewart*, 427 U.S. 539, 560-61 (1976).

with Freifeld and the Law Firm, and had adequate notice of the details of the injunction to place him on notice of his obligations thereunder". Appendix B at pages 22a, 23a. The circuit court did not state that the trial court's factual finding was "clearly erroneous" as is required under the proper standard of review.[7]

WHAT IS SOUGHT

First, this Petition asks the Court to review the inconsistent application of the specific procedural due process "notice" requirements of 42(b) throughout the circuits and within the Sixth Circuit Court of Appeals itself, and then correct this uneven situation by holding that the specific procedures concerning notice must be followed in order to find someone guilty of non-summary criminal contempt.

Second, this Petition asks this Court to determine whether the First Amendment of the U.S. Constitution protects a person from criminal punishment imposed by a federal district court for using an unsealed document which is already part of a state court public record in a state court proceeding, and then correct the situation by holding that it is improper to punish someone criminally under these circumstances.

Third, this Petition asks this Court to determine whether a circuit court can create federal subject matter jurisdiction where none exists by making a conclusive finding of fact contrary to the district court record without showing clear error by the district court, and then correct this situation by holding that it is improper for a circuit court to create subject matter jurisdiction in this manner.

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[7] *Anderson v. Bessemer City*, 480 U.S. 470 U.S. 564, 573-75 (1985)

FACTS MATERIAL TO THE QUESTIONS PRESENTED

Tom R. Pabst (hereinafter "Attorney Pabst") was the attorney of record for two State of Michigan "reverse discrimination" cases, in which the City of Flint, Michigan, was the Defendant. While pursuing these two State of Michigan reverse discrimination cases, Attorney Pabst became aware of highly relevant direct evidence of a policy by Defendant City of Flint to discriminate against white employees. The direct evidence at issue consisted of the sworn deposition testimony of a witness named Vicki Rose who testified under oath about the City's policy based upon her own personal knowledge from discussions with the Defendant City's Human Resource Director. Attorney Pabst became aware of this when he was provided a copy of said deposition transcript on or about March 7, 2000. RE 93, sub exhibit 1.

Notably, the Vicki Rose deposition of March 7, 2000, was attached as an exhibit in one of the State of Michigan court answers/briefs in response to Defendant's state court motion for summary disposition as of September 11, 2000, and has never been sealed.[8]

On December 18, 2000, the federal district court, Eastern District of Michigan, issued an opinion and order in the federal case of *Banner v. City of Flint*, et al, 136 F. Supp. 678 (2000), essentially precluding use of the Vicki Rose transcript in "any other proceeding by any attorney." RE76; Appendix E, page 68a. The facts and events leading to the opinion and order are set forth in the Affidavit of Attorney Glen Lenhoff, RE93, sub exhibit 5 thereof.

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[8] RE 110, sub exhibit 16 to exhibit 1.

Notably, Attorney Pabst was not involved as an attorney in the federal *Banner, supra*, case, which settled in October, 2000, before the 12-8-00 injunction was issued. RE93, sub exhibit 1. Tom R. Pabst was not present during any conversations between Attorney Freifeld and witness Vicki Rose which gave rise to the injunction. RE93, sub exhibit 1. Tom R. Pabst was not a witness nor a party in the federal *Banner, supra*, case. Attorney Pabst was not an officer, agent, servant, or employee or agent of a party in the *Banner* action. Further, the federal district court itself, made a finding of fact that, "there is no evidence that Pabst has, or is acting in active concert or participation with Plaintiff's counsel...". Appendix D, pages 46a-47a. The "Plaintiff's counsel" being referred to was Attorney Freifeld and the Law Firm of Glen Lenhoff.

Attorney Pabst attempted to take the deposition of witness Vicki Rose in his state court cases. The Defendant City of Flint refused to allow Vicki Rose to testify about the policy issue at her deposition in the state court case. Defendant City, by its counsel, took the position that the federal court opinion dated December 18, 2000 precluded Attorney Pabst from questioning Vicki Rose on this issue even in the state court case. Attorney Pabst disagreed that the federal court opinion/order of December 18, 2000 applied to him or his state court cases. RE 93, sub exhibit 6. Attorney Pabst subsequently filed identical petitions in state court asking the state court judges to determine, amongst other issues, whether the state court defendant City of Flint, by its counsel, can preclude the taking of the deposition of Vicki Rose in state court concerning an issue she had testified about in a sworn deposition.

Defendant City of Flint then brought a "contempt" motion against Attorney Pabst in the federal district court. The

federal district court did not provide notice to Attorney Pabst that he would face criminal contempt sanctions in any of the specifically required ways enumerated in Federal Criminal Procedure 42(b): Attorney Pabst was not given a notice stating the time and place of hearing, nor allowing for a reasonable time for the preparation of the defense at this hearing, nor did the court give notice to Attorney Pabst stating the essential facts constituting the criminal contempt charge and describe it as such. Further, this notice was not given orally by the judge in open court in the presence of the Defendant or on application of the U.S. attorney or of an attorney appointed by the court for that purpose or by a show cause or order of arrest. Thus, none of the specific requirements of 42(b) were complied with by the federal district court. The federal district court then issued an, "Order Holding Tom R. Pabst in Contempt, Denying Pabst's Motion for Disqualification and Denying Pabst's Motion for Sanctions" dated 2-23-01, Appendix D, RE 98. Attorney Pabst immediately filed an appeal to the Sixth Circuit Court of Appeals.

Subsequently, the defendant City of Flint filed eleven motions in limine within eight days of the scheduled start of one of the State of Michigan reverse discrimination trials and in order to effectively respond, Attorney Pabst filed with his answer another copy of the unsealed state court public record, the March 7, 2000 Vicki Rose transcript. Defendant City then filed another motion with the federal district court again seeking sanctions against Attorney Pabst for again allegedly violating the December 18, 2000 injunction. RE 109, pg. 470, of JA volume I. Again, the federal district court did not conduct a hearing, did not notify Attorney Pabst of the time and place of a hearing, nor allow reasonable time for the preparation of the defense at the hearing, nor did the district court orally give notice of all of the above, including the

essential facts constituting the alleged criminal contempt charge nor describe it as such in open court in the presence of the defendant (Attorney Pabst). Thus, the federal district court did not satisfy any of the specific requirements of Federal Rule of Criminal Procedure 42(b) concerning notice to Attorney Pabst but still issued an order dated January 23, 2002 sanctioning Attorney Pabst criminally. Appendix C, pages 25a-28a. Attorney Pabst filed a motion for reconsideration with the federal district court which was denied. RE 118 and RE 124. Attorney Pabst filed a timely appeal of this order to the Sixth Circuit Court of Appeals.

The Sixth Circuit Court of Appeals consolidated the appeal of the 1-23-02 criminal sanction with the appeal of the 2-23-01 criminal sanction which had also been consolidated with the appeal of Attorneys Freifeld and Lenhoff in *Banner v. City of Flint, supra*.

The Sixth Circuit Court of Appeals correctly ruled that Attorney Pabst was not given proper notice pursuant to Rule 42(b) with respect to the first criminal contempt sanction imposed upon him and therefore reversed that order, appeal no: 01-1401.

The Sixth Circuit Court of Appeals concerning the criminal sanctions order in case 02-1297 found Attorney Pabst "fully" on notice as of the January 23, 2001 order because, the Sixth Circuit Court of Appeals held, that the "first hearing and first sanction, accompanied by the district court's explanation of her rationale, therefore, unequivocally put Pabst on notice that continuous violations of the injunction order would neither be tolerated nor forgiven". Appendix B at page 23a. However, there never was a "hearing" for either the first sanction or the second sanction, no oral argument, and Attorney Pabst was never physically in front of this or

any other federal district court judge for this matter. Thus, what the Sixth Circuit Court of Appeals essentially found to be the equivalent of notice under 42(b) is not one of the specifically enumerated notice requirements of 42(b).

Notably, the Sixth Circuit Court of Appeals, which essentially held in this case that the requirements of 42(b) did not have to be specifically met if notice is given in some other way, cited the Sixth Circuit Court case of *In Re Smothers, supra*, in support of this position. Appendix B at page 22a. Inconsistently, the Sixth Circuit Court of Appeals in *Smothers, supra*, however specifically held that, "...in order to find someone guilty of criminal contempt under Rule 42(b) these specific procedures concerning notice must be followed. The notice requirement upholds basic elements of due process," and further held, "Nevertheless, the law in this circuit is clear: Smothers situation does not fall under 42(a) and the notice requirements of 42(b) must be followed." *Smothers, supra*, at page 441.

Thus, the Sixth Circuit Court of Appeals has departed from its own previous standard when applying 42(b) in this case by now stating that the specific requirements of 42(b) do not have to be followed. This inconsistent and uneven application of 42(b) is not just a situation within the Sixth Circuit Court of Appeals but is also true amongst the circuits. For example, in *U.S. v. Onu*, 730 F.2d 253 (5th Cir. 1984), the Court of Appeals held that a contempt conviction for an attorney who failed to appear for trial because of conflicting duties could be sustained under Rule 42(b) despite the fact that the notice requirements of 42(b) were not followed.

The Sixth Circuit Court of Appeals in this case also made a finding of fact that:

> "We find that Pabst was both in active concert and participation with Freifeld and the law firm..."
>
> ***
>
> "We find that these facts put Pabst in "privity" with Freifeld, at least as it relates to the substantive matter of the district court's injunction."

(Appendix B, page 20a).

However, the district court which issued the sanction order against Pabst specifically found the facts to be the opposite:

> "In order for this court to hold Pabst bound by the portions of the order specifically contained to plaintiff's counsel, he would have to be "in active concert or participation with" them. Rule 65(d)."
>
> ***
>
> "There is no evidence that Pabst has or was acting in active concert or participation with plaintiff's counsel and, therefore, he is not bound by the portion of this court's order specifically pertained to plaintiff's counsel." Appendix D, pages 46a-47a.

The Sixth Circuit Court of Appeals, therefore created subject matter jurisdiction by making a finding of fact contrary with the trial court's finding of fact; and, for a reason that was not part of the trial court's basis for imposing sanctions upon Attorney Pabst. The Sixth Circuit Court of Appeals was supposed to review questions of fact for clear

error.[9] In applying the clearly erroneous standard, the Court of Appeal's cannot retry issues of fact or substitute its judgment with respect to such issues for that of the trial court, and further, the clearly erroneous standard does not permit a reviewing court to reverse the trial court's finding simply because it is convinced that it would have decided the case differently. See *Anderson, supra*, at pages 573-75.

Thus, the Sixth Circuit Court of Appeals has created subject matter jurisdiction where none existed. First, the underlying case in which the federal district court had subject matter jurisdiction, *Banner, supra*, settled in October of 2000. The 12-18-00 order/injunction arose out of an alleged ethical violation by Attorney Freifeld. Therefore, there was no case or controversy involving Attorney Pabst in which the federal district court had subject matter jurisdiction. Further, the federal district court made a specific finding that Attorney Pabst was not in active concert or participation with Attorney Freifeld or his law firm. Hence, the Sixth Circuit Court of Appeals had to make its own finding of fact contrary to the federal district court in order to arguably create subject matter jurisdiction where none existed.

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[9] *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d , 568, 572 (6th Cir. 2002).

REASONS FOR GRANTING THE WRIT

Question 1. When construing Federal Rule of Criminal Procedure 42, should the specific procedural due process court "notice" requirements be applied the same amongst and within all federal circuits?

One of the most basic elements of procedural due process is notice. Federal Rule of Criminal Procedure 42(b) was created to specifically address this element and 42(b) has exact requirements. The uneven and inconsistent application of these exact requirements amongst and within the circuits runs contrary to the fundamental right of every citizen to due process as embodied in the Fifth Amendment.

Conclusion of Question 1.

The split amongst and within the circuits undermines the importance of an even and consistent application of 42(b) to the fundamental procedural due process right of notice.

If the Sixth Circuit Court of Appeals had employed the correct, exact requirements of 42(b) it should have reversed the federal district court of Eastern Michigan for improperly imposing criminal sanctions and, more importantly, would have followed a standard consistent with every citizens' fundamental right to procedural due process.

Question 2. Is the use of an unsealed document which was already part of a state court public record in a state court proceeding protected by the United States Constitution, including specifically the First Amendment, from a federal district court's injunction/restraint upon the use of said document by the device of criminal sanctions against a state court attorney?

A review of this Court's decisions shows a consistent balancing of interests whereby the First Amendment of the United States Constitution protects citizens from punishment or liability when publishing truthful information contained within documents which are already part of the public record. *Cox, supra, Near, supra, New York Times, supra, and Nebraska Press Association, supra.*

Answer to Question 2.

If the Sixth Circuit Court of Appeals had properly applied the United States Constitution, in particular, the First Amendment, to a balancing of interests in this case, it should have reversed the federal district court's improper imposition of criminal sanctions against a state court attorney.

Question 3. Can a federal circuit court create subject matter jurisdiction where none exists by making a conclusive finding of fact directly opposite of the finding of the district court without showing clear error pursuant to the proper appellate standard?

The underlying case or controversy giving rise to Article III jurisdiction from which the 12-18-00 injunction arose settled in October of 2000. Attorney Pabst was not a part of

the underlying *Banner, supra* case in any way. The 12-18-00 injunction was issued subsequently as a result of an alleged violation of a state of Michigan ethical rule which occurred prior to the October 2000 settlement by a different attorney, not Attorney Pabst. When the federal district court criminally sanctioned Attorney Pabst, it specifically found that Attorney Pabst was not acting in active concert or participation pursuant to FRCP 65(b) with the attorney who had allegedly violated the state of Michigan ethical rule. The Sixth Circuit court of Appeals; however, did not apply the "clearly erroneous" appellate standard to these facts and then made its own finding of fact that Attorney Pabst "was both in active concert and participation" with the attorney accused of allegedly violating this ethical rule. Thus, the Sixth Circuit Court of Appeals created Article III subject matter jurisdiction where none existed.

Answer to Question 3.

Had the Sixth Circuit Court of Appeals properly applied the "clear error" appellate standard to the factual findings of the district court related to FRCP 65(d), it should have reversed the district court's imposition of criminal sanctions by determining that there was no subject matter jurisdiction in this case.

CONCLUSION

The Sixth Circuit Court of Appeals uneven and inconsistent application of the exact procedural due process notice requirements of 42(b) in this case is illustrative of the same problem amongst the circuits. The time has come for clarification so that all the circuits will evenly apply rule 42(b) consistent with the fundamental due process rights of every citizen as embodied in the Fifth Amendment.

So, too, guidance is needed concerning the constitutional First Amendment protection of citizens from criminal punishment for publishing an unsealed document which was already part of the state court public record in a state court proceeding.

Finally, an Article III court of appeals should not create subject matter jurisdiction where none exisits.

For these reasons and those set forth above, the Petition for Write of Certiorari should be granted and the judgment below reversed.

Respectfully Submitted,

TOM R. PABST
Counsel of Record
MICHAEL A. KOWALKO
2503 S. Linden Road, Suite 185
Flint, MI 48532
Tel.: (810) 732-6792
Fax: (810) 732-8430

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-1401; 02-1297

[Filed April 28, 2004]

ELIZABETH BANNER;
Plaintiff,

TOM R. PABST, P.C.; TOM R. PABST,
Appellants,

v.

CITY OF FLINT; CARL HAMILTON;
Defendants-Appellees,

VICKIE ROSE,
Intervenor-Appellee.

ORDER

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 01-1118/01-1401/02-1297

[Filed April 8, 2004]

ELIZABETH BANNER,	)
Plaintiff,	)
	)
MICHAEL FREIFELD AND LAW	)
OFFICE OF GLEN N. LENHOFF,	)
Appellants,	)
	)
TOM R. PABST,	)
Appellant.	)
	)
v.	)
	)
CITY OF FLINT AND	)
CARL HAMILTON.	)
Defendants-Appellees.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 99-74600. Roberts. 12-27-00, 02-26-01, 02-28-02

JUDGES: Before: MARTIN and DAUGHTREY, Circuit Judges, O'MALLEY, District Judge.*

OPINION

PER CURIAM. These consolidated appeals challenge three orders entered by the district court imposing sanctions against attorney Michael Freifeld, his law firm, and attorney Thomas Pabst. The underlying case was settled and dismissed by stipulation of the parties.

The factual circumstances in this case are complex and unlikely to be repeated. At the same time, Messrs. Freifeld and Pabst raise a great number of issues, stemming in part from the complicated nature of the relevant facts. A full discussion of the facts, and a complete analysis of the issues raised, would require a lengthy opinion. This case, however, has minimal precedential value. For these reasons, we have set forth below only an abbreviated discussion of the factual history and the many arguments raised, even though our analysis has been painstaking. Ultimately, we conclude as follows.

With regard to the district court's sanction order against attorney Freifeld and his law firm: (1) the district court was within its rights to conduct an evidentiary hearing regarding Freifeld's behavior; (2) the district court properly used a de novo review of the Magistrate Judge's ruling; (3) the district court concluded correctly that Freifeld did breach Michigan Rule of Professional Conduct 1.6; (4) the district court had the authority to impose sanctions for this breach; (5) Freifeld

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* Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

and his law firm received adequate notice before the district court imposed sanctions; (6) neither the sanction of $15,000 in attorney fees payable to defendant Flint, nor the sanction of $5,000 in attorney fees payable to defendant Rose, were unreasonable, and both sanctions were within the district court's power and discretion; (7) the district court had the power and authority to impose a $5,000 sanction in the form of a fine payable to the court; (8) the district court followed the proper procedure regarding imposition of the $5,000 sanction, given that the sanction was not in connection with a finding of contempt; (9) nonetheless, the sanction of $5,000 payable to the clerk of court was unreasonable and an abuse of discretion in the circumstances, because the $20,000 attorney fee sanctions alone adequately served the necessary punitive and deterrent purposes. Accordingly, we **AFFIRM** the sanction against Freifeld and his law firm of $15,000 in attorney fees payable to defendant Flint, and **AFFIRM** the sanction against Freifeld and his law firm of $5,000 in attorney fees payable to defendant Rose, but we **REVERSE** the sanction against Freifeld of $5,000 payable to the clerk of court.

With regard to the sanctions against attorney Pabst: (1) the Anti-Injunction Act is inapposite to the question of the court's authority to sanction Pabst's conduct; (2) the propriety of the district court's injunction is controlled by Fed. R. Civ. P. 65; (3) the district court's injunction was arguably overbroad, to the extent it forbade use of the Rose deposition in *any* case by *any* attorney, but it was not overbroad as to attorney Pabst, who was acting "in active concert or participation" with Freifeld; (4) despite this possible overbreadth, Pabst's willful defiance of the district court's injunction order was completely inappropriate; (5) the district court was correct in its conclusion that Pabst disobeyed a district court order, he did so deliberately, and he did so beyond a reasonable doubt

(*see In re Smothers*, 322 F.3d 438, 441-42 (6th Cir. 2003)); (6) the $1,000 and $2,000 fines payable to the clerk of court, although reasonable in amount, were criminal in nature; (7) as such, the district court had to comply with the notice provisions of Fed. R. Crim. P. 42(b); (8) as to the first contempt fine of $1,000, the district court did not comply with Rule 42(b), because it did not give Pabst adequate notice that he might be subject to criminal sanctions; (9) as to the second contempt fine of $2,000. Pabst did receive adequate notice; and (10) the trial judge did not err when she declined to recuse herself. Accordingly, we **AFFIRM** the $2,000 sanction against Pabst, payable to the Clerk of Court, but we **REVERSE** the $1,000 sanction against Pabst, payable to the Clerk of Court, and **REMAND** this case with directions that the district court may address again the propriety of the first sanction against Pabst.

Finally, we **DENY** the motion by Flint and Rose for sanctions against Pabst on appeal.

I. BACKGROUND

Michael Freifeld, an associate in the Law Office of Glen N. Lenhoff (the Law Firm), represented Elizabeth Banner in a race discrimination case against Flint. In early 2000, another Flint employee, Vickie Rose, met Freifeld separately to discuss a potential employment-related claim against Flint. During Rose's meeting with Freifeld, she shared confidential information about her job. During the consultation, Freifeld told Rose that he represented Banner and that he might wish to call Rose as a witness. He asked Rose to sign an affidavit in support of Banner's claims, but she refused. Ultimately, Rose decided not to retain Freifeld and not to sue Flint, opting instead to avoid disruption of her job.

Freifeld later noticed Rose's deposition in the Banner case as an employee-witness, and Flint, not being aware of Freifeld's earlier conversations with Rose, instructed Rose to appear. On March 7, 2000, Rose was deposed by Freifeld without the benefit of personal counsel. Freifeld proceeded to question Rose about the matters discussed during their initial attorney-client consultation. While Rose responded to the questions put to her, Rose later testified that she did not appear at the deposition voluntarily, but was required to do so by her job, and that she did not voluntarily provide information in order to assist Banner's case against Flint. Rose also said she did not think Freifeld would ask about the confidential matters they discussed, and that Freifeld never told her that she had the right to assert an attorney-client privilege or any other right to confidentiality with respect to her earlier discussions with him.

After Freifeld deposed Rose, he gave a copy of the transcript to Pabst, a lawyer who was not associated with the Law Firm, but was involved in other cases against Flint. Pabst deposed Rose in May in connection with a state-court employment action against Flint and asked about the confidential information she had provided to Freifeld.

In June, facilitators in *Banner* recommended a settlement of $170,000. The parties did not initially agree to this settlement. On June 27, Flint and Rose moved for an order: 1) striking Rose's deposition testimony; 2) preventing her deposition testimony from being used in *any* legal or administrative proceeding; 3) barring Banner's attorneys from inquiring into areas in which Rose could assert her attorney-client privilege; and 4) imposing sanctions. In opposition, Banner argued that Rose waived her attorney-client privilege by voluntarily appearing at the deposition and answering questions without objection. Freifeld and the Law Firm

argued that they committed no ethical violations. A magistrate judge held a hearing and issued an order denying the motion to strike on grounds that, even if she did not understand the concept of attorney-client privilege. Rose had, nonetheless, waived her privilege vis-a-vis Freifeld by answering questions at the deposition without a contemporaneous objection. Flint and Rose filed objections in district court, seeking an order granting their motions or a hearing.

In October, the parties reached an agreement to settle the Banner case for $130,000. On October 10, Lenhoff, Freifeld, and attorneys for Flint were to meet with the district judge for a pretrial conference in another case. The parties told her the *Banner* case had settled. She asked about the objections to the magistrate judge's order and said she was concerned about the deposition. Though Freifeld and the Law Firm argued that those matters had been mooted by the settlement, the judge told Freifeld and Lenhoff that she was referring the matter to the Michigan Attorney Grievance Committee and ordered them to appear, along with Rose, for *in camera* review of all records about Rose.[1]

The court held an evidentiary hearing on November 3, 2000. The court explained that the hearing was necessary because of her concern that certain ethical violations had occurred in a matter pending before her; the court found that the settlement did not moot those concerns. The parties not only addressed the issues presented to the magistrate judge, but, at the request of the district judge, also addressed

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[1] It does not appear that either Flint or Rose sought to keep the matter alive post-settlement; all parties appear to have been surprised by the district court's unwillingness to ignore this seemingly collateral issue.

Michigan Rule of Professional Conduct 1.6. covering confidentiality. The parties had earlier briefed Michigan Rule of Professional Conduct 1.9, regarding the attorney-client privilege and its application to former clients, but had not addressed a lawyer's general obligation to maintain client confidences.

The district court found that Freifeld and the Law Firm breached both the attorney-client privilege and the obligation of confidentiality imposed by Rule 1.6 in taking the Rose deposition. The court set aside as clearly erroneous the magistrate judge's order denying the motion to strike the deposition. The court stated that Freifeld showed "a disregard for the rules of professional conduct" and found he and his law firm misinterpreted another ethics rule not at issue here.[2]

The court remarked that Freifeld "display[ed] a reckless attitude toward the rules of professional conduct" in pressuring Rose to disclose confidential information and that he showed a lack of concern for whether her disclosures would be detrimental once revealed. This violated "the spirit, if not the letter," of the Michigan Rules, according to the district court. The court struck Rose's deposition; enjoined *Banner's attorneys* from distributing it or disclosing its contents: and prohibited them from deposing Rose about matters in it. The court also enjoined use of the deposition in *any other proceeding by any attorney*. Finally, the court imposed a $5.000 sanction payable to the court against

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[2] Both the magistrate judge and district court found that Freifeld and his firm had engaged in improper ex parte contact with Flint's former employees in violation of Michigan Rule of Professional Conduct 4.2 and barred further such contact, though no sanction was imposed in connection with that conduct. The parties have not appealed that aspect of the lower court's ruling.

Freifeld, and ordered Freifeld and the Firm to pay Flint's attorney $15,000 in fees (relating to the Rose deposition, the motion for a protective order and the hearing) and to pay Rose's attorney $5,000 for fees (in connection with her request for a protective order and attendance at the hearing). Lastly, the district court stated it would refer Freifeld and the Law Firm to the state Attorney Grievance Commission.

After the district court prohibited the deposition's use, an attorney for Flint sent a letter to Pabst with a copy of the order, telling Pabst that the court had barred him from using the deposition in state court. Pabst disagreed, asserting that he did not believe the order could bind him in state court and stating that he would ask the state court to conduct its own hearing. Pabst made several filings in state cases, attaching complete transcripts of the deposition to two motions, stating he was challenging the injunction. Pabst did not seek relief from the federal court order before the district court, however, and he did not seek to appeal that order to this Court. Indeed. Pabst concedes that he knowingly violated the district court order based on his own determination that the order was invalid. Attorneys for Flint and Rose filed a motion in the district court to hold Pabst in contempt. In his answer, Pabst made many arguments, including his assertion that the district judge should disqualify herself because she had displayed hostility toward Banner's attorneys by sanctioning them, that the injunction did not comply with Federal Rule of Civil Procedure 65(d), that Pabst was not among the parties or agents involved in *Banner* or in active concert or participation with them, and that the order could not apply to his actions in state court.

The district judge denied the motion to disqualify herself. The court then found that Pabst was bound by her order and held Pabst in contempt, imposing a sanction of $1.000

payable to the court. Despite this order, Pabst continued to ignore the injunction. Again, Pabst did not seek and await an order setting aside the injunction; he, instead, continued to ignore the injunction order based on his own disagreement with the trial judge's authority to enter it. In September 2001, Pabst filed an answer to Flint's motions in state court and renewed a request for an evidentiary hearing, again attaching the deposition transcript. Flint again sought sanctions against Pabst. On January 23, 2002, the district court held yet another hearing and imposed an additional fine of $2,000 on Pabst, payable to the Clerk of Court, for contempt. Pabst finally filed a motion to modify the injunction with the district court on April 22, 2002. That motion was denied. While Pabst did not appeal the district court's Spring, 2002 order, he did timely appeal the two sanctions orders entered in February, 2001 and January, 2002, respectively. Both of Pabst's appeals have been consolidated with the appeals taken by Freifeld and the Law Firm.

II. ANALYSIS

A. Freifeld's Appeal

Freifeld's multiple assertions fall into three categories. First, the district court did not have authority to reverse the magistrate judge and used the wrong standard of review in doing so. Second, the court's analysis of attorney-client privilege was wrong with respect to waiver, as was its analysis of the Michigan Rules of Professional Conduct. Third, the district court abused its discretion in imposing sanctions. We disagree with all of these assertions, save a portion of the third.

The Magistrate Judge's Decision

Pursuant to the Federal Magistrate Judge's Act, 28 U.S.C. § 636, a district court may designate a magistrate judge to decide any nondispositive pretrial matter. *Id.* § 636 (b)(1)(A). A district court may reconsider a magistrate judge's decision on matters so designated and overturn it only if it is "clearly erroneous or contrary to law." *Id.* Freifeld and the Law Firm rely on our decision in *United States v. Curtis*, 237 F.3d 598 (6th Cir. 2001), to argue that the trial court applied the wrong standard and used a *de novo* review. We remanded in *Curtis,* though, not because the district court applied the wrong standard, but because we could not tell what standard it used. *Id.* at 603-04. Here, it is obvious from the district court's opinion that she felt that the magistrate judge's decision was clearly erroneous for a number of reasons, not the least of which was the magistrate judge's failure to consider certain ethical standards the district court found controlling. Specifically, the district court concluded that the magistrate judge's failure to consider Freifeld's duty of confidentiality rendered the underlying order "contrary to law."

The district court was correct to conduct an evidentiary hearing, moreover, despite Freifeld's objections to one. In *Connetta v. National Hair Care Centers, Inc.*, 236 F.3d 67 (1st Cir. 2001), the First Circuit wrote that, although the Federal Magistrate's Act does not expressly allow the district court to take new evidence in non-dispositive matters referred to a magistrate judge, "it is not clearly forbidden either if there is good cause for revisiting the matter." *Id.* at 74. The court iterated that the case belongs to the district judge and that the Federal Magistrate's Act is designed to ensure that parties may have a pretrial ruling reconsidered where the ruling is based on error or mistake of law, and *not* to limit the power of the district judge. *Id.* Here, the court considered

evidence submitted to the magistrate judge, and determined that the ethical issues needed further inquiry.

We agree that the magistrate judge did not consider Rule 1.6, so the district court was entitled to take evidence and decide on the application of that rule. Inherent power stems from the concept that courts have powers necessary to exercise their other powers. *Chambers v. NASCO. Inc.*, 501 U.S. 32, 35, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates ...." *Anderson v. Dunn.* 19 U.S. 204, 6 Wheat. 204, 227, 5 L. Ed. 242 (1821). With regard to Rule 1.6. the district court invoked its powers to consider issues the magistrate judge had not. We find, moreover, that, once invoked, the district court correctly assessed that disciplinary rule and had the right to control attorney conduct before her by sanctioning violations of it.[3]

Ethical Considerations

When a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client, and the elements of the attorney-client privilege we set forth in *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998), are satisfied:

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[3] While we tend to agree with the district court that the magistrate judge's interpretation of the attorney client privilege and attendant principles of waiver was also clearly erroneous in the circumstances presented here, we need not reach that issue because we find the district court's consideration of Rule 1.6 to have been both within the scope of her authority and, ultimately, correct.

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose. (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser. (8) unless the protection is waived.

To encourage candor in the attorney-client relationship, the lawyer must maintain confidentiality of information relating to the representation. *See* Michigan Rules of Professional Conduct 1.6, cmt. The ethical rule of confidentiality is closely related to the evidentiary rule of attorney-client privilege. Hazard, Geoffrey C., Jr., and Hodes. W. William. 1 The Law of Lawyering § 9.7 (3d. ed. 2001). The difference is that confidentiality "applies to virtually all information coming into a lawyer's hands concerning a client, and forbids virtually all disclosures ...." *Id.* The privilege is narrow in scope, invoked in response to an attempt to compel testimony, where the testimony sought is about information passed between lawyer and client. *Id.* The duty of confidentiality "directs lawyers not to disclose -- voluntarily or otherwise, unless an exception applies, information that the lawyer has learned *about* a client, no matter where or how the information was learned." *Id.* Thus, if Rose's information was protected by attorney-client privilege, and Rose waived the privilege, its disclosure by Freifeld would still be subject to his duty of confidentiality.

Flint and Rose cite several cases to support the proposition that Freifeld breached ethical duties when deposing Rose. *See, e.g., United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991) (holding a conflict of interest arose when attorney loyalties were divided, and loyalties were divided when an attorney cross-examined former clients). Michigan Rule 1.6

allows disclosure of confidences and secrets with consent of the client "but only after full disclosure." Full disclosure is advising the client about the advantages *and disadvantages* of revelation in language the client can understand. Hazard at § 9.16. We cannot find where Freifeld gave full disclosure before laying bare Rose's confidences. Thus, we find that substantial evidence supports the district court's finding that Freifeld violated Rule 1.6.

Sanctions Against Freifeld and the Law Firm

The district court did not state under what authority it was imposing sanctions, though the court did clearly differentiate between its award of attorneys fees against Freifeld and the Law Firm and the imposition of a fine on Freifeld individually. Courts need specific statutory authority, the presence of bad faith, or the willful disobedience of a court order before they award attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). We stated in *Tiedel v. Northwestern Michigan College*, 865 F.2d 88, 93-94 (6th Cir. 1988), that, absent Congressional authorization, federal courts may exercise inherent powers to award attorneys' fees in "narrowly defined circumstances." When an attorney or litigant has demonstrated bad faith in the conduct of litigation, the court has the inherent authority to assess an award of attorneys' fees. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980). Imposition of sanctions comes from the court's power to police itself, so that a court can vindicate its authority without resorting to a finding of contempt of court. *Chambers*, 501 U.S. at 46. If the district court uses its inherent powers to sanction, it must find that the questioned conduct constitutes or is tantamount to bad faith. *Id.* at 767. As we noted in *Scharer v. Plabell Rubber Products, Inc.*, 858 F.2d 317, 320

(6th Cir. 1988), attorneys' fees have been awarded under inherent authority "in the interest of justice" with no finding of bad faith. *Id.*

In *First Bank of Marietta v. Hartford Underwriters Insurance Company*, 307 F.3d 501, 513 (6th Cir. 2002), we discussed *Mann v. University of Cincinnati, V*, Nos. 95-3195, 95-3292, 1997 WL 280188 (6th Cir. May 27, 1997), in which we held that the conduct the district court found "tantamount" to bad faith was indeed bad faith, despite no express language in the district court's opinion. *Id.* Clearly, a district court has within its power the authority to consider ethical breaches occurring in the context of litigation under its auspices and to impose sanctions for such breaches. No magic words are necessary to support the imposition of sanctions where the record is sufficiently detailed and the evidence in that record supports the conclusion that sanctionable conduct, in fact, occurred.

A court must give notice and afford an attorney opportunity to be heard before imposing sanctions. *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 822. The district court must give parties facing sanctions minimal procedural protections, but not formal notice detailing the penalties or a full evidentiary hearing. *Id.* A full evidentiary hearing is not needed when the court has sufficient relevant information, including pleadings or materials filed in the record, to decide. 207 F.3d at 823. Here, Freifeld and the Law Firm had ample notice that the district court was considering sanctions. On October 12, 2000, the district court ordered Rose and Freifeld to appear at a November 3, 2000 evidentiary hearing on Flint's and Rose's objections to the magistrate judge's order regarding the motion to strike, and also ordered Freifeld to produce for *in camera* review all notes and records regarding Rose. Even ignoring the notice

Freifeld received by virtue of the motion to strike and evidentiary hearing in front of the magistrate judge, the district court certainly provided Freifeld with sufficient notice that it was going to hold its own hearing to consider the propriety of sanctions: the district court even telegraphed the depth of its concern with Freifeld's actions when it set the hearing date. Thereafter, the court held a fairly detailed hearing, making a full record of the proceeding and of its findings. Ultimately, we are satisfied that Freifeld and the Law Firm were afforded adequate notice and access to substantial judicial processes before sanctions were imposed upon them.

The final question is the reasonableness of the sanctions imposed. As to the attorneys' fees awarded to Flint and Rose, we find that the record supports the conclusion that the fees and costs incurred by virtue of the ethical breaches upon which the sanctions were based reasonably approximate the sums imposed by the district court. Accordingly, we find that the district judge acted within her discretion, and acted reasonably, in awarding $15,000 and $5,000 in attorney fees to Flint and Rose, respectively.[4]

We find, however, that the additional $5,000 against Freifeld, payable to the Clerk of Court, was not reasonable in the face of the substantial fee awards otherwise imposed. In the past, this Court has expressed concern over payment of a fine into the court under Rule 11 where the procedural protections otherwise applicable to a criminal contempt finding are not strictly employed *Scharer*, 858 F.2d at 321. We recently held, however, that a small fine payable to the

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[4] Indeed, the court was quite temperate in her consideration of these serious matters.

court is acceptable in certain circumstances, even when summarily imposed. *In re Smothers*, 322 F.3d 438, 443 (6th Cir. 2003). While we decline to draw a line demarcating where a fine ceases to be sufficiently small to fall within the bounds of *Smothers,* we are troubled by the size of the fine imposed upon Freifeld in this case. The district court did not provide any rationale for the fact or amount of the "additional sanction" she imposed upon Freifeld. We find that, in light of both the attorneys' fee awards imposed and the procedural status of the case (the sanctions were imposed post-settlement), the additional $5,000 was not reasonably related to the punitive and deterrent purposes of the sanctions.

Ultimately, we **AFFIRM** the district court's award of a total of $20,000 in attorneys' fees to Flint and Rose, payable by Freifeld and the Law Firm, but **VACATE** the $5,000 fine payable to the court as unreasonable in the circumstances.

B. Pabst's Appeal

Reach of the Injunction

Pabst argues that the injunction could not bind him and that, accordingly, he could not be sanctioned for failure to follow it, because the Anti-Injunction Act. 28 U.S.C. § 2283, generally bars federal courts from entering orders which bar pending state court proceedings. *See, e.g., In re Dublin Sec., Inc. v. Hurd*, 133 F.3d 377, 380-81 (6th Cir. 1997). While Pabst spends much time analyzing the Anti-Injunction Act and the district court cited authority analyzing whether and to what extent that Act limits a federal court's authority to protect the rights and obligations of the litigants before it, we find the Anti-Injunction Act inapposite. The district court did not purport to prohibit state court proceedings involving Flint and its employees and did not even prohibit counsel in such

proceedings from eliciting, from Rose or otherwise, the very factual testimony she provided in this action. All the district court did was to prohibit the use of a deposition transcript which the court found was obtained unethically and in derogation of the protections afforded Rose under the law in the course of a litigation pending before her.

We find that this case is more accurately analyzed under Federal Rule of Civil Procedure 65(d) and those cases interpreting it and does not require parsing of the Anti-Injunction Act or the scope of any exceptions thereto.

Rule 65(d) provides that:

> every order granting an injunction ... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them ...

Our deepest concern with the relief fashioned by the district court is that it enjoins non-parties to the litigation in *Banner*. We have often reiterated the principle that injunctive relief should be no broader than necessary to remedy the harm at issue. *See, e.g., United States v. Miami Univ.*, 294 F.3d, 797, 816 (6th Cir. 2002). In *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d 568 (6th Cir. 2001), we explained that Federal *Rule 65(d)* is based on the doctrine that "a decree of injunction not only binds the parties defendant but also those represented by them or subject to their control." *Id.* at 574 (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 89 L. Ed. 661, 65 S. Ct. 478 (1945)). To determine whether a person is "in active concert or participation with" an enjoined party, we look to the actual relationship between the two. *Id.* The third party is bound "if that party is identified with the named, enjoined party in

interest, in 'privity' with it, represented by it or subject to its control." *Id.*

We hold that forbidding the use of the Rose deposition in the *Banner* case and forbidding its use by Pabst in other cases were both appropriate exercises of the district court's authority. We reach this conclusion because we find that Pabst was both in active concert and participation with Freifeld and the Law Firm, and had adequate notice of the details of the injunction to place him on notice of his obligations thereunder.

On this point, we note that Freifeld was the source of the copy of the deposition Pabst possessed and that Freifeld provided that transcript to Pabst for the precise purpose of enhancing Pabst's litigation posture against Flint, thereby encouraging Pabst's use of the very information Rose had disclosed to Freifeld in confidence. Pabst knew that Freifeld provided the deposition to him for the purpose of using the information provided by Rose against her employer. We find that these facts put Pabst in "privity" with Freifeld, at least as it relates to the subject-matter of the district court's injunction. *See Blackard*, 262 F.3d at 574 ("to determine whether a person is one who acts in concert ... with the enjoined party, the court must look to the actual relationship between the person enjoined and the person thought to be bound by the injunction"); *Black's Law Dictionary* 1079 (5th ed. 1979) (the "concept of 'privity' pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party"). Thus, while we agree that the district court's order may have been overbroad *as against the world in general,* we do not find it to have been overbroad as to Pabst.

Contempt Orders and Sanctions Against Pabst

We stated in *Blackard* that parties bound on its face by an injunction must follow it when it is in effect, even if it is later found erroneous. It is completely unacceptable for an attorney to defy an order of a federal court flagrantly and purposefully, even if the decision to do so is premised on a good-faith disagreement over the scope or validity of that order. *See N. Am. Coal Corp. v. Local Union 2262, United Mine Workers of Am.*, 497 F.2d 459, 465 (6th Cir. 1974) ("of course, even if the district court's injunction was invalid for the reasons we have outlined, it is settled law that it still must be obeyed until and unless it is overturned on appeal."). Pabst openly and admittedly chose to challenge the district court's order by disobeying it. Pabst did *not* file for modification of the order until after he was found in contempt and he did not await ruling from this Court vacating that order before he repeated his contemptuous conduct. With more civilized means of challenging a court order available, Pabst simply chose a course of flagrant defiance. Such defiance runs counter to acceptable attorney conduct and the efficient administration of justice. The two findings that Pabst was in contempt were not an abuse of discretion, and we uphold them with an observation that such conduct is below that expected of an attorney admitted to practice in our courts.

The district court imposed sanctions, payable to the clerk of court, after finding contempt. In *Downey v. Clauder*, 30 F.3d 681, 685 (6th Cir. 1994), we recognized the power of federal courts to impose civil or criminal sanctions on an attorney, but the court must look to both the proceeding and the relief granted to determine whether a contempt order is civil or criminal in nature. *Id.* Civil contempt sanctions are intended "to enforce compliance with court orders and to compensate injured parties for losses sustained." *Id.* Sanctions

imposed "to vindicate the authority of the court by punishing past acts of disobedience" are criminal in nature. *Id.* Thus, an "unconditionally payable fine" for a contempt finding is criminal in nature. *Id.*

Several requirements must be satisfied before such a criminal contempt sanction may be imposed. The law requires four things: a finding that the individual violated a district court order: a finding that he did so deliberately; a finding that he so acted beyond a reasonable doubt; and notice, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, that failure to comply with the court's orders could result in a criminal sanction and that the court was considering the imposition of such a sanction. *See Smothers*, 322 F.3d at 441-42 (listing the four conditions for imposition of a criminal contempt sanction.).

In *Downey*, 30 F.3d at 686, we held that a conviction of criminal contempt without proper notice does not comport with the strictures of Rule 42(b). Here, the district court did not initially give Pabst notice that he would be subject to criminal sanctions. The original notice for a hearing ordered Pabst to appear, but did not charge him with criminal contempt, nor even suggest he may be subject to punitive criminal sanctions for prior use of the Rose deposition. We conclude, accordingly, that the district court did not follow Rule 42(b) with respect to the first $1,000 contempt sanction imposed upon him. We, therefore, **REVERSE** the February, 2001, order imposing the $1,000 sanction (Appeal No. 01-1401). and **REMAND** for the district court to reconsider that sanction in accordance with this opinion.[5]

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[5] On this point, we reiterate that the first three prerequisites to the imposition of a contempt sanction were clearly satisfied.

We find, however, that Pabst was *fully* on notice as of the January, 2002, sanctions order that his conduct would subject him to a finding of contempt and that a call to appear before the court in connection with that conduct would, in fact, be for the *precise* purpose of determining the propriety of such an award. The first hearing and first sanction, accompanied by the district court's explanation of her rationale, therefore, unequivocally put Pabst on notice that continued violations of the injunction order would neither be tolerated nor forgiven. We therefore **AFFIRM** the sanctions order that is the subject of the appeal in Case 02-1297.

Recusal of Judge Roberts

On appeal, Pabst requests that we find that Judge Roberts should have recused herself and that we remand with direction to assign a different judge. We review such decisions for abuse of discretion. *Union Planters Bank v. L & J Dev. Co..*, 115 F.3d 378, 382 (6th Cir. 1997). Under 28 U.S.C. § 455(a), recusal is warranted where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Union Planters Bank*, 115 F.3d. at 383 (quoting *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993), *cert. denied*, 510 U.S. 1163, 114 S. Ct. 1188, 127 L. Ed. 2d 538 (1994)). We have found no grounds for recusal.

Sanctions on Appeal

Flint and Rose move for sanctions in this appeal to punish Pabst for items in his brief they believe are frivolous. While the brief in question neither reflects exemplary legal writing nor, candidly, sufficient respect for the federal courts, it does not require further proceedings before us or additional sanctions. Thus, we **DENY** the motion.

III. CONCLUSION

In Freifeld and the Law Firm's appeal (Case No. 01-1118), we **AFFIRM** the district court's finding that Freifeld breached ethical rules, and hold that it did not err in reviewing the magistrate judge's order. We also **AFFIRM** the imposition of the injunction as it applies to use of the deposition by Freifeld and the Law Firm. We **AFFIRM** the judgment imposing sanctions generally, and the sanctions order imposing a total of $20,000 in attorneys' fees specifically, but **REVERSE** the $5,000 fine payable to the court.

In Pabst's appeals, we **AFFIRM** the injunction to the extent it forbids Pabst from using the Rose deposition, and **AFFIRM IN-PART** the finding of contempt against Pabst (Case No. 01-1297), and **REVERSE IN-PART** the imposition of sanctions against Pabst (Case No. 01-1401). We **REMAND** for further proceedings, as appropriate.[6]

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[6] We do not *direct* the district court to conduct further proceedings; we merely find that further proceedings in Case No. 01-1401 may be appropriate. The district court is free to assess whether such proceedings are necessary in light of our other findings.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 99-74600

[Filed January 23, 2002]

ELIZABETH BANNER,	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF FLINT AND	)
CARL HAMILTON,	)
Defendants.	)
	)

ORDER GRANTING DEFENDANT'S AND INTERVENOR'S EMERGENCY MOTION TO HOLD ATTORNEY TOM R. PABST IN CONTEMPT FOR AGAIN VIOLATING THIS COURT'S DECEMBER 18. 2000 OPINION AND ORDER

On October 2, 2001, the above entitled motion (Doc. #109) was filed with the Court. Attorney Tom Pabst has answered. Additionally, this Court entered an order allowing the Defendant and Intervenor to file certain documents under seal. Those documents are those specifically referred to by Defendant and Intervenor in their Motion, in which Tom

Pabst either excerpted portions of the stricken March 7, 2000 deposition of Vickie Rose ("Rose") for inclusion in papers filed in state court, or quoted portions of the stricken transcript during a state court proceeding.

In this Court's original Order pertaining to the March 7, 2000 deposition of Rose, the Court made clear that for certain ethical violations, the March 7, 2000 Rose deposition was stripped of its evidentiary value and stricken from the record. That Order also enjoined the use of that particular Rose deposition in any other proceeding by any attorney. At the time of entry of the Court's December 18, 2000 Order, the Court was keenly aware that Ms. Rose's attorney had provided copies of her deposition to other lawyers, and particularly to Tom Pabst. Mr. Pabst was served with the December 18th Order.

In a subsequent Order entered by the Court on February 23,2001 holding Tom Pabst in contempt for attaching full copies of the stricken Rose deposition to motions for evidentiary hearings filed in cases pending in Genesee County Circuit Court, this Court clarified the December 18th Order, which in essence was an injunction. The Court held that while the use of the March 7, 2000 Rose deposition was enjoined, and Pabst had violated the Court's injunction by attaching the depositions to the motions for evidentiary hearings, the injunction did not preclude Pabst from deposing or cross-examining Rose on any matters that were the subject of her March 7, 2000 deposition.

Pabst apparently took full advantage of this clarification and deposed Rose on March 15, 2001 in *Greg Doll vs City of Flint,* a case pending in Genesee County Circuit Court (Case No. 00-67045-CL). It was this deposition which was the subject of the City of Flint's Motion in Limine in the *Doll*

case as well as in the *Wooster v* City of Flint, (Genesee County Case No: 99-66002-CL) case. These are the same two cases in which Pabst had filed the full Rose *stricken* depositions in support of motions for evidentiary hearings. In responding to the Motions in Limine filed by the City of Flint in those two cases, attorney Pabst, representing the plaintiffs in both cases, decided to renew prior motions filed in those state court actions - motions to "Determine Admissibility Of Vickie Rose Sworn Deposition Testimony In The Elizabeth *Banner* Case, And For This Court To Determine Whether Defendant And/Or Defense Counsel have Suborned Perjury." These responses were filed, respectively, in the *Doll* case on August 8,2001, and in the *Wooster* case on September 10, 2001. It should be pointed out that in this Court's Order of February 23, 2001, the Court specifically stated that the "Court finds it unnecessary to enter an order enjoining Pabst from proceeding in state court to litigate the admissibility of the March 7, 2000 deposition of Rose, as the December 18, 2000 Order already prohibits attorneys, such as Pabst, from using that deposition in any proceeding." Court's Order, p. 18.

The Defendant's and Intervenor's Motion prompting this Court's Order today, was filed on October 2, 2001.

The Court will not reiterate what has clearly been set forth in its two prior Orders concerning the binding effect of its December 18, 2000 Order and this Court's authority to strip the March 7, 2000 Rose deposition of all of its evidentiary value in order to protect the judgment of the Court that the deposition was tainted by ethical violations of Rose's attorney.

Given the prior holdings of this Court, the Court finds that Tom Pabst has again violated the Court's Order of December 18, 2000.

The Court hereby GRANTS Defendant's and Intervenor's Emergency Motion to Hold Attorney Tom R. Pabst in Contempt for Again Violating this Court's December 18, 2000 Opinion and Order (Doc #109), and SANCTIONS Tom Pabst in the amount of Three Thousand Dollars ($3,000) payable within 10 days of the date of this Order to the Clerk of the Court. Further, within 10 days of the date of this Order, Mr. Pabst is required to disclose the identities of each individual to whom he has provided the stricken Rose deposition or disclosed its contents, and the dates that he provided the deposition or disclosed its contents to such persons, so that the City of Flint can provide such persons with a copy of this Court's December 18, 2000 Order.

IT IS SO ORDERED.

/s/
Victoria A. Roberts
United States District Judge

Dated: January 23, 2002

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 99-74600

[Filed February 23, 2001]

ELIZABETH BANNER, Plaintiff(s),	)
vs.	)
CITY OF FLINT and CARL HAMILTON, Defendant(s).	)

ORDER HOLDING TOM R. PABST IN CONTEMPT, DENYING PABST'S MOTION FOR DISQUALIFICATION AND DENYING PABST'S MOTION FOR SANCTIONS

I. Introduction

Pending before the Court is Defendants' and Intervenor Vickie Rose's Emergency Motion to Hold Tom R. Pabst in Contempt for Violating This Court's December 18, 2000 Opinion and Order. In addition to responding to that Motion, Pabst has moved to disqualify this Judge and for sanctions against Defendants' counsel. For the reasons that follow, the

Court with grant in part and deny in part Defendants and Rose's Motion to hold Pabst in contempt and will deny Pabst's Motions.

II. Background

Rose is the Employee Health Clinic Coordinator for Flint. She met with Plaintiffs attorney, Michael Freifeld, on what he recalls to be February 4, 2000 to determine whether Rose had a viable lawsuit arising out of her employment. Toward that end, Rose shared information with Freifeld regarding her then supervisor, Tony Morolla, that was relevant to Plaintiff's lawsuit against Defendants for reverse discrimination.

Subsequently, Freifeld noticed up Rose's deposition, which she appeared for on March 7, 2000. During the deposition, Freifeld's questions mirrored the discussion Rose had had with him during their consultation. Thereafter, on June 27, 2000, Defendants and Rose filed their Motion for Protective Order to Strike Ms. Rose's Deposition Testimony and to Disqualify the Law Office of Glen N. Lenhoff. They argued that Freifeld had violated Rose's attorney-client privilege and that she did not waive her privilege by answering Freifeld's deposition questions. In a December 18th 2000 Opinion and Order Setting Aside in Part The August 3, 2000 Order of Magistrate Judge Thomas A. Carlson, this Court agreed and found that Freifeld's actions violated MRPC 1.6. So finding, the Court struck Rose's deposition, sanctioned Freifeld and his law firm and enjoined their use of the deposition, and enjoined "the use of the Rose's deposition in any other proceedings by any attorney." (12/18/00 Order at 22).

During the November 3, 2000 evidentiary hearing regarding Defendants' and Rose's Motion to Disqualify the

Law Office of Glen N. Lenhoff, Freifeld acknowledged that he had provided attorney Tom Pabst with a copy of Rose's deposition (Tr. At 80). Accordingly, defense counsel supplied Pabst with a copy of this Court's December 18 Opinion. Pabst responded by letter on December 27, 2000, stating that he questioned the finality and binding effect of this Court's Opinion. In particular, Pabst contends that the state court is not bound by this Court's Order. He has, therefore, filed Motions for Evidentiary Hearings in two Genesee County Circuit Court cases, *Wooster v. City of Flint*, 99-66002 and *Doll v. City of Flint*, 00-67045. Pabst's Motions seek to compel Flint to produce "Rose for deposition to testify fully and truthfully, as she did in the *Elizabeth Banner* case, that Defendant has a POLICY of favoritism towards black employees at the expense of white employees." (Dft's Ex. I and Ex. J). To support his Motions, Pabst attached complete copies of Rose's depositions to his filings.

Defendants' and Rose's Motion to Hold Pabst in Contempt followed. The Court will grant that motion as well as Defendants and Rose's request to sanction Pabst. In all other respects, Defendants' and Rose's motion will be denied.

III. Analysis

A. Pabst's Motion to Disqualify this Judge

As an initial matter, the Court will deny Pabst's Motion to Disqualify this Judge. Pabst's Motion to Disqualify is based upon an allegedly improper *ex parte* communication between this Judge and defense counsel and the alleged hostility this Judge showed toward Plaintiffs counsel. In other words, Pabst is not arguing that this Court is biased against him; rather, he is relying solely upon this judge's alleged bias

against Plaintiffs counsel. And, to support his claims, Pabst relies primarily upon an Affidavit of Glen N. Lenhoff.

Lenhoffs charges of bias on the part of this Judge, and Pabst's reliance upon those charges to file his Motion to Disqualffy, are untimely because they are brought after this Court's adverse ruling against the Lenhoff law firm. Such was the holding of *Rabushka ex rel. U.S.v. Crane Co.*, 122 F.3d 559, 566 (8th Cir. 1997).

> [B]ecause [a motion for recusal] was not filed until after the district court had granted summary judgment to Crane [the opposing party] on the merits of the case, the motion was untimely. *See In re KPERS*, 85 F.3d [1353, 1360 (8th Cir. 1996)](recusal motion untimely and interposed for suspect tactical reasons, 'can and should' be denied on that basis alone); *see also Neal v. Wilson*, 112 F.3d 351,357 n. 6 (8th Cir. 1997) (disapproving of tactic of waiting until after district court issued unfavorable ruling before moving for recusal).

Also see In re City of Detroit, 828 F.2d 1160, 1167 (6th Cir. 1987)(holding that 28 U.S.C. § 455 implicitly requires that disqualification motions be made timely).

Further, Lenhoffs' perception that this Judge was hostile toward him and Freifeld is an insufficient basis for disqualification under § 455(a). Section 455(a) provides, "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Disapproving expressions by a judge are insufficient to establish partiality. "*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that

are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994)(emphasis in original). Nor are judicial remarks of even the hostile variety. *Id.* at 555. Likewise, Pabst's argument that this Court's December 18, 2000 Opinion evidences hostility toward Plaintiff's counsel is unavailing. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.*

Moreover, this Judge's alleged bias against Plaintiff's counsel is insufficient to support a Motion for Disqualification. "As a general rule, bias against the party must be shown...." *Panzardi-Alvarez* v. U.S., 879 F.2d 975, 984 (1st Cir. 1989).

Further, The Court finds that there was nothing inappropriate in its communication with defense counsel on the day that the magnitude of the problem surrounding the Vicki Rose deposition was crystallized. Counsel for the City of Flint appeared for a status conference on another discrimination case filed against it (the *Gale* case), by the same attorneys who represented Elizabeth Banner, the case in which the Rose deposition was taken. While counsel indicated that a potential settlement in the *Banner* case might negate the need for a ruling on a pending summary judgment motion, it was also indicated that objections filed to the magistrate judge's ruling on the propriety of the Rose deposition, and whether any ethical violations occurred, was still concernable. It was also indicated during the status conference on the *Gale* case, that the same issue might arise in the *Gale* case. Indeed, shortly after the status conference in the *Gale* case was held, Defendants filed a motion for a protective order against Plaintiffs counsel, the Law Office of Glen Lenhoff, and including Mr. Freifeld, citing counsel's alleged inappropriate

contacts with supervisory/managerial employees of the City of Flint, including Vicki Rose.

The Court believed it appropriate, since a monetary settlement in the *Banner* case would not moot its inherent power to consider potential unethical conduct which could permeate other litigation, to consider some of the concerns addressed in the objections filed in the *Banner* case which defense counsel believed would also be injected into the *Gale* litigation, outside of the presence of counsel for the Plaintiff. As this Court stated in its original Order, regardless of the wishes of the parties litigating the *Banner* case, this Court has an independent interest and the inherent authority to enforce the rules of professional conduct. *Zachair, Ltd. v. Driggs*, 965F. Supp. 741,749 (D.Md. 1997).

Accordingly, the Court will deny Pabst's Motion to Disqualify.

B. Binding Effect of December 18, 2000 Order

Much of Pabst's response to the instant Motion challenges this Court's authority to enjoin any attorney from using the Rose deposition in any proceeding. Notwithstanding Pabst's doubts about the merits of this Court's order, it is binding upon him and other attorneys. The Supreme Court has recognized "the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even ff they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375,386 (1980). *Accord, NAACP, Jefferson County Branch v. Brock*, 619 F.Supp. 846, 849 (D.D.C. 1985) ("It is an established principle of law that once a court issues an

injunction, those persons who are subject to it are to obey the terms of that order as long as it remains in effect.").

Hence, until and unless this Court's December 18, 2000 injunction is overruled by an appellate Court, Pabst is unquestionably bound by it.

C. <u>This Court's Ability to Bind Non-Parties</u>

Furthermore, this Court's injunction of the use of the Rose deposition by non-parties was proper because it was necessary in order to effectuate its judgment. This case is akin to *U. S. v. Hall*, 472 F.2d 261 (5th Cir. 1972). In *Hall,* the trial court had entered a judgment in the case of *Mims v. Duval County School Board* that required the school board to implement a desegregation plan. As a result of the disruption of the plan by adult outsiders, the school board superintendent petitioned the trial court for injunctive relief. The trial court granted the petition, entering an order that enjoined certain activity on the part of the students "and other persons acting independently or in concert with them and having notice of this order ...." *Id.* at 263. Subsequently, Eric Hall, who had been served with the injunction, was arrested and then held in criminal contempt for being at a high school for the express purpose of violating the injunction.

On appeal, Hall's challenges to the injunction were akin to Pabst's.

> On this appeal Hall raises two related contentions. Both contentions depend on the fact that Hall was not a party to the *Mims* litigation and the fact that, in violating the court's order, he was apparently acting independently of the *Mims* parties. He first points to the common law rule that a nonparty who violates an

> injunction solely in pursuit of his own interests cannot be held in contempt. Not having been before the court as a party or as the surrogate of a party, he argues that in accordance with this common law rule he was not bound by the court's order. Second, he contends that Rule 65(d) of the Federal Rules of Civil Procedure prevents the court's order from binding him, since Rule 65(d) limits the binding effect of injunctive orders to 'parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.'

Id. at 264.

In rejecting Hall's challenges, the Court of Appeals first distinguished the case before it from those in which "the activities of third parties, however harmful they might have been to the plaintiffs' interests, would not have disturbed in any way the adjudication of rights and obligations as between the original plaintiffs and defendants." *Id.* at 265.[1]

> The activities of Hall, however, threatened both the plaintiffs' right and the defendant's duty as adjudicated in the *Mims* litigation. In *Mims* the plaintiffs were found to have a constitutional right to attend an integrated school. The defendant school board had a corresponding constitutional obligation to provide them with integrated schools and a right to be free

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[1] The cases from which the *Hall* court distinguished itself were *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930) and *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934).

> from interference with the performance of that duty. Disruption of the orderly operation of the school system, in the form of a racial dispute, would thus negate the plaintiffs' constitutional right and the defendant's constitutional duty. In short, the activities of persons contributing to racial disorder at Ribault imperiled the court's fundamental power to make a binding adjudication between the parties properly before it.

Id., (citation omitted). Observing that the court's inherent power to render binding judgments over a case with which it has jurisdiction was at stake, the court concluded that "disruptive conduct would not only jeopardize the effect of the court's judgment already entered but would also undercut its power to enter binding desegregation orders in the future." *Id.*

The *Hall* court additionally likened its case to those involving in rem injunctions.

> Federal courts have issued injunctions binding on all persons, regardless of notice, who come into contact with property which is the subject of a judicial decree. A court entering a decree binding on a particular piece of property is necessarily faced with the danger that its judgment may be disrupted in the future by members of an undefinable class - those who may come into contact with the property. The in rem injunction protects the court's judgment.

Id. at 265-266, (citation omitted).

The Court of Appeals also rejected Hall's argument that Fed. R. Civ. P. 65(d) precluded the trial court from enjoining

non-parties that did not act is concert with the parties to the action.

> Literally read, Rule 65(d) would forbid the issuance of in rem injunctions. But courts have continued to issue in rem injunctions notwithstanding Rule 65(d), since they possessed the power to do so at common law and since Rule 65(d) was intended to embody rather than to limit their common law powers.
>
> Similarly, we conclude that Rule 65(d), as a codification rather than a limitation of courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment.

Id. at 267.

In this case, Pabst argues that he cannot be bound by the December 18, 2000 Order because he was not acting in concert with Freifeld. However, as noted in *Hall*, Rule 65(d) does not limit this Court's inherent power to protect its ability to render binding judgments. And, had the Court failed to include an injunction against the use of the Rose deposition by any attorney in any proceeding, the effect of this Court's Order would have surely been jeopardized.

Like the parties in Hall, Pabst's attempt to use the Rose deposition threatens both Rose's right and Freifeld and the Lenhoff firm's duty as adjudicated before this Court. In this case, the Court found that Rose had a right - an attorney-client privilege - and that Freifeld violated that privilege by cross-examining Rose without her clear consent. The Court remedied that ethical violation by, *inter alia*, striking the deposition and protecting Rose from further harm as a result of Freifeld's ethical breach. Allowing other attorneys to take

advantage of Freifeld's ethical violation would undermine Rose's privilege and would jeopardize the effect of the Court's Order.

Pabst insists that this Court's Order is an unwarranted interference in state court proceedings. However, the Order does not dictate the actions of any other court. Rather, the Order proscribes the use of the Rose deposition by any attorney. As with in rem actions, this Court was faced with the danger that its Order protecting Rose from further harm caused by Freifeld's ethical violation may be disrupted in the future by other attorneys who have or may come into possession of the deposition transcript. The injunction against the use of the deposition, like an in rem injunction, protects the Court's judgment.

The fact that the injunction against the use of the Rose deposition by non-parties was necessary in order to effectuate this Court's judgment that the deposition should be stripped of its evidentiary value, deems this case distinguishable from *Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d 1390 (Fed.Cir. 1996). In that case, a company named Addictive Control & Measurement Systems ("Adcon") committed patent infringement and unfair competition with respect to its sale of a flowmeters. As a result, the trial court entered an injunction against Adcon. Subsequently, the president of Adcon, Galen Cotten, who was not named in the injunction, conspired with others to market other flowmeters based upon the same infringing design. The conspirators formed two companies, TruGear and Truflo, to manufacture and market the new devices, which were called TruGear meters. Two other companies, Nice Instrument Services and Nice Instrument Sales, began to distribute the TruGear meters.

In response those developments, the trial court issued a new injunctive order that barred Cotton, his affiliates and those in active concert with him from making or selling the new flowmeters. Further, the new order prohibited TruGear, Truflo and the Nice companies from destroying or disposing of any TruGear flowmeters, and required the companies to provide an accounting of their TruGear meter sales.

On appeal, the Federal Circuit reversed, rejecting the claim that the All Writs Act[2] authorized the district court to extend its injunction to non-parties. Citing *Hall* as an example, the *Additive Controls* court noted that the All Writs Act authorizes courts to issue directives to non-parties "'as necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of jurisdiction otherwise obtained."' *Additive Controls* at 1396, *citing U.S. v. New York Tel. Co.*, 434 U.S. 159,172 (1977). However, the Act "does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* at 1396-1397, (citation and quotation marks omitted). The court found that principle to apply to the case before it:

> Although an injunctive order prohibiting non-parties from disposing of TruGear meters may be more efficient than a separate lawsuit against those parties, the All Writs Act does not authorize that kind of adjudicative shortcut. With regard to their independent activities (i.e., activities independent of Adcon or

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[2] The All Writs Act, 28 U.S.C. § 165 l(a), states, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> Cotton), the corporate appellants are entitled to contest their liability and the appropriateness of equitable relief in a lawsuit in which they are named as parties.

Id. at 1397.

Additive Controls is inapposite to this case. This Court's injunction is not an effort to conveniently dispose of any other attorney's ability to contest liability for his or her independent activities; no other attorney's independent activities are relevant to the injunction. The Court's prohibition against the use of the Rose deposition is based upon the fact that that deposition is tainted, being the product of an ethical violation on the part of Freifeld. Like an in rem injunction, this Court's Order proscribes the use of the Rose deposition by any attorney that has or may come in contact with it, without regard to any liability on the part of such an attorney.

Pabst reliance upon *McDowell v. Calderon*, 173 F.3d 1186 (9th Cir. 1999), is likewise unavailing. That case involved a petition for a writ of habeas corpus by a state prisoner who argued that his Sixth Amendment right to effective assistance of counsel had been violated. After ordering an evidentiary hearing, the trial court ruled that the petitioner's claim constituted a waiver of his attorney-client privilege. Hence, his lawyers were allowed to examine certain documents in *McDowell's* trial counsel's file. A protective order was also entered, which limited the use and access of the allegedly ineffective counsel's file. The file was only to be used by the California Attorney General's office for the purpose of the petition for writ of habeas corpus on the effective counsel claim.

After failing on the ineffective assistance claim but prevailing on a separate claim relating to the penalty phase of

his trial, the petitioner was granted a writ of habeas corpus with respect to his death sentence. Additionally, the trial court reaffirmed its earlier, limiting protective order covering the attorney-client material previously disclosed to the Attorney General.. At that time, the state filed a motion for reconsideration, arguing that the protective order improperly interfered with the petitioner's state court criminal retrial. The Court of Appeals agreed, stating, "Such an unprecedented order contravenes basic principles of comity and federalism." *Id.* at 1191.

Pabst's reliance on *McDowell* is misplaced for two reasons. First, this Court has not interfered with any state proceedings; the Court has proscribed the use of a deposition that was noticed up and taken under the authority of the Federal Rules of Civil Procedure in a case before this Court. That the Rose deposition originated in a matter before this Court distinguishes this case from *McDowell,* where the court was reviewing a state criminal action and the effectiveness of counsel in a state court proceeding. The conduct under scrutiny in this case occurred in a matter before this Court. Consistent with its inherent authority to enforce the rules of professional conduct in action before it, *Zachair, Ltd. v. Driggs*, 965 F.Supp. 741,749 (D.Md. 1997), the Court found that Rose's deposition was tainted by Freifeld's ethical violation. To protect that judgment and to strip the deposition of any evidentiary value, the Court has enjoined any attorney from using the deposition in any proceeding. Thus, unlike in *McDowell*, this Court has protected its own authority to enter a binding order rather than interfered in a state court action.

The second and equally compelling reason why Pabst's reliance upon *McDowell* is misplaced is because the opinion he cites was withdrawn, 187 F.3d 1160 (9th Cir. 1999), and reheard en banc. Unlike the opinion upon which Pabst relies,

the opinion resulting from the Ninth Circuit's en banc review resulted in an affirmation of the trial court's protective order. Upon rehearing, the court noted that the appeal was of the trial court's denial of a motion for reconsideration. Consequently, the issue was whether the trial court had committed clear error in entering its protective order. The court concluded,

> The warden contends that, because raising ineffective assistance of counsel claims in a habeas petition waives the attorney-client privilege, the district court erred in prohibiting the Attorney General from disclosing the documents discovered from McDowell's trial counsel's file to 'prosecutorial personnel or agencies' for use in connection with McDowell's penalty phase retrial. It is debatable whether the district court can so limit the Attorney General's use of the documents from McDowell's trial counsel's file. The question being a debatable one, the district court did not commit clear error when it limited access to the file pursuant to the terms of the protective order. District courts have very broad discretion in fashioning discovery orders under Fed.R.Civ.P. 26(c), and the protective order did not fall clearly outside the bounds of that authority. The district court therefore did not abuse its discretion in denying reconsideration.

McDowell v. Calderon, 197 F.3d 1253, 1255-1256 (9th Cir. 1999).[3]

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[3] In a January 29, 2001 hearing before Genesee County Circuit Court Judge Richard B. Yuille, Pabst represented that the earlier opinion in *McDowell* had been reinstated and is valid law again (Tr. at 6). That representation is not true. The last published filing in the *McDowell* case is the Supreme Court's denial of certiorari of

Thus, even in *MCDowell,* where the protective order was clearly aimed at proscribing the disclosure and use of evidence in a state court proceeding, the Ninth Circuit did not find the trial court to have committed clear error.

D. The Injunction is Reasonably Specific

Lastly, the Court rejects Pabst's argument that the injunction does not comport with Rule 65(d) because it is too vague. "The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996). Injunctions are not set aside "under Rule 65(d) unless they are so vague that they have no reasonably specific meaning." *U.S.v. V- 1 Oil Co.*, 63 F.3d 909, 913 (9th Cir. 1995). Further, the requirement of specificity does not demand unnecessary wordiness.

> The operative words in the preliminary injunction -- 'any colorable imitation' of a particular logo -- are words of legal art. Euroquilt does not propose a formulation that would have given it better notice. 'Colorable imitation' leaves a lot to the imagination, but Rule 65(d) does not require a torrent of words when more words would not produce more enlightenment about what is forbidden. When the difficulty stems from the inability of words to describe the variousness of experience, the court may prefer

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the Ninth Circuit's later opinion affirming the trial court's protective order. *Calderon v. McDowell*, __ U.S. __, 120 S. Ct. 1708 (2000).

> brief imprecise standards to prolix imprecise standards.

Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1432 (7th Cir. 1985).

Pabst argues that the injunction against "the use of Rose's deposition in any proceeding by any attorney" is too vague. His argument notwithstanding, the Court's injunction is similar to, and no more vague than, that in Allard Enterprises, Inc. v. *Advanced Programming Resources, Inc.*, 146 F.3d 350 (6th Cir. 1998). The injunction in that case provided "that 'plaintiffs are permanently enjoined from continuing to use the mark 'APR' or the mark 'APR of Ohio' in connection with the business of placing temporary or contract computer-oriented personnel with employers.'" *Id.* at 360. The Sixth Circuit found that language sufficient. "This language clearly forbids plaintiffs from any use of these marks and provides adequate notice of the proscribed conduct." *Id.*

As an attorney at law, Pabst surely knows the specific manners in which depositions are used in legal proceedings, he knows the various types of legal proceedings and he knows how to identify an attorney. The Court's brief description is sufficient to inform an ordinary attorney exactly what conduct is proscribed. The fact that Pabst is able to come up with far-fetched examples of how the injunction may be read, e.g., a Japanese attorney using the Rose deposition in a Japanese court, does not negate the reasonable specificity of the order.

Further, Pabst undoubtedly knew that his action of attaching full copies of the Rose deposition to the state court filings contravened this Court's Order. During a January 29, 2001 hearing in front of Judge Richard B. Yiuille of the Genesee County Circuit Court, Pabst boasted, "I'm not

troubled with attaching a copy of the transcript to a motion. I mean, to me that's how I challenge the federal court's order." (1/29/01 Tr. at 8). In light of his admission that his actions were to challenge this Court's Order, Pabst representation that he does not understand the meaning of the Order cannot be taken seriously.

E. Relief Requested

By filing Rose's deposition in the Genesee County Circuit Court, Pabst has violated the portion of this Court's Order that "ENJOINS the Use of the Rose's deposition in any other proceedings by any attorney." For that, Pabst will be sanctioned. Also, implicit in this portion of the Court's earlier Order prohibiting any attorney from using the Rose deposition in other proceedings, is a prohibition which would extend to Mr. Pabst, barring him from sharing the Rose deposition with attorneys whom he knows will use the deposition in other legal proceedings.

However, the Court will not extend its injunction to preclude Pabst from deposing or cross-examining Rose on any matters that were the subject of her March 7, 2000 deposition. In this Court's December 18, 2000 Order, Plaintiff's counsel was enjoined from disclosing the contents of the deposition to anyone else and from deposing or cross-examining Rose on the subject matter of her March 7, 2000 deposition. However, that portion of the injunction was not extended to "any attorney."

In order for this Court to hold Pabst bound by the portions of the Order specifically pertaining to Plaintiffs counsel, he would have be "in active concert or participation with" them. Rule 65(d). "The 'active concert or participation' clause is designed to prevent.., the addressee of an injunction, eager to

avoid its obligations, persuad[ing] a friendly third party to take steps that frustrate the injunction's effectiveness." *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000 (7th Cir. 2000).

In this case, Pabst's questioning of Rose on the subject matter of her earlier deposition would not aid Plaintiffs counsel in any effort to avoid their legal obligations under the injunction. Furthermore, the evidence in this case reveals that Freifeld gave Pabst a copy of the Rose deposition before this Court's injunction: As a result, his giving Pabst a copy the deposition cannot be viewed as an effort to thwart his legal obligation under the injunction. There is no evidence that Pabst has or is acting in active concert or participation with Plaintiffs counsel and, therefore, he is not bound by the portions of this Court's Order specifically pertaining to Plaintiff's Counsel.

Finally, the Court finds it unnecessary to enter an order enjoining Pabst from proceeding in state court to litigate the admissibility of the March 7, 2000 deposition of Rose, as the December 18, 2000 Order already prohibits attorneys, such as Pabst, from using that deposition in any proceeding.

F. Pabst's Motion for Sanctions

The Court will deny Pabst's Motion for Sanctions because it violations E.D. Mich. LR 7.1(c)(1)(A) in that the Motion is not supported by a brief. Further, Defendants' and Rose's Motion is not frivolous, and Pabst did not follow the 21 day safe harbor rule found under Fed. R. Civ. P. 11(1)(A). Finally, Pabst's Motion for Sanctions is itself frivolous and contemptuous by requesting, *inter alia,* that Defendants' counsel and Rose be made to "take legal and ethics classes so that they are properly educated about principles of federalism,

comity, and ethics in the representation made to judges." (Mot. For Sanctions at ¶ 2).

IV. Conclusion

Pabst is bound by the Court's injunction even if he had proper objections and, in any event, his objections are without merit. He has challenged this Court's authority to enjoin his use of the deposition by filing the Rose deposition in Genesee County Circuit Court and, as a result, he will be sanctioned.

THE COURT HEREBY GRANTS IN PART AND DENIES IN PART Defendants and Rose's Motion to Hold Tom Pabst in Contempt [document 87-1]; SANCTIONS Tom Pabst in the amount of One Thousand Dollars ($1,000) payable within 10 days of the date of this Order to the Clerk of the Court; **DENIES** Pabst's Motion to Disqualify Judge **[document 92-1]**, and, DENIES Pabst's Motion for Sanctions **[document 92-2]**.

/s/
VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

DATED: FEB 23 2001

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Case No. 99-74600

[Filed December 18, 2000]

ELIZABETH BANNER,
Plaintiff(s),

v.

CITY OF FLINT and CARL HAMILTON,
Defendant(s).

JUDGE: VICTORIA A. ROBERTS, UNITED STATES DISTRICT JUDGE.

OPINION AND ORDER SETTING ASIDE IN PART THE AUGUST 3, 2000 ORDER OF MAGISTRATE JUDGE THOMAS A. CARLSON

A.

This reverse discrimination case is before the Court on Defendants' and Intervenor Vickie Rose's ("Rose") Objections to the Magistrate Judge's August 3, 2000

Recommended Order[1] on Defendant's Motion for Protective Order to Strike Intervenor Vickie Rose's Deposition Testimony *and to Disqualify the Law Office of Glen N.* Lenhoff.

As is apparent from the title of the Objections, this instant dispute arose out of the March 7, 2000 deposition of Rose. That deposition was noticed by Plaintiff's counsel Michael Freifeld of the Lenhoff law firm. Defendants and Rose contend that, in taking her deposition, attorney Michael Freifeld and his law firm committed ethical violations.

Based on the papers submitted and the evidentiary hearing held on November 3, 2000, the Court agrees.

B.

Rose is the Employee Health Clinic Coordinator for Flint. She met with Freifeld on what he recalls to be February 4, 2000. The purpose of meeting was for Freifeld to determine whether Rose had a viable lawsuit arising out of her employment with the City of Flint. Toward that end, Rose shared information with Freifeld regarding her then supervisor, Tony Morolla. Rose informed Freifeld that Morolla told her that he would not follow up on white employees' discrimination complaints. Morolla's alleged reason was that the Flint mayor did not want Morolla to upset black employees before an election. Both of these pieces of

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[1] The Order at issue was not actually "recommended." The matter referred to Magistrate Judge Carlson was one that he was empowered to decide; he was not limited to making a recommendation to this Court. Fed. R. Civ. P. 72(a).

information are relevant to Banner's lawsuit against Defendants for reverse discrimination.

After hearing her employment complaints, Freifeld told Rose that she did not have an actionable claim. She recalls that he told her that she should contact him if anything new occurred, holding out the possibility of future representation. Freifeld, however, does not recall indicating that he might represent Rose in the future.

Both Freifeld and Rose agree that, at some point during their discussion, he asked her if she knew Banner and if she knew that Banner had filed a lawsuit against the City. Rose did know Banner, because Banner had filed a stress claim with Rose, who receives such claims in her capacity as the Employee Health Clinic Coordinator for Flint. The Freifeld/Rose discussion then turned to whether Rose would divulge the information she had shared regarding Morolla in the Banner lawsuit and in other reverse discrimination lawsuits filed by the Lenhoff firm against Flint.

Rose and Freifeld both testified that he asked Rose to sign an affidavit and that Rose indicated she would like to think about it. However, they differ on whether they discussed Rose disclosing the information in a deposition. Freifeld testified that Rose agreed to the deposition, stating that it would look more involuntary than if she signed an affidavit. Rose denies that she ever agreed to the deposition. She testified that she left Freifeld's office with only an agreement for her to consider signing an affidavit.

Subsequently, Rose was notified by the City of Flint legal staff that her deposition had been noticed in the Banner lawsuit. Rose appeared for the March 7, 2000 deposition without notifying Flint's attorneys about her consultation with

Freifeld. However, the attorney for the City of Flint did ask Rose during her deposition whether she had met with counsel from the Lenhoff office, presumably because of the precise nature of the questioning; during the deposition, Freifeld's questions mirrored the discussion Rose had had with him during their consultation. Following the deposition, the Flint attorney did not get any other information from Rose concerning her consultation with Freifeld.

Rose's deposition was noticed again, by another attorney with a reverse discrimination case against the City of Flint, for May 12, 2000. Flint was represented by yet another attorney. In a discussion off record, Rose finally told Flint counsel that she had consulted with the Lenhoff firm. Thereafter, Flint counsel interjected numerous objections at the May 12th deposition. However, none of them was based on attorney-client privilege.

Thereafter, on June 27, 2000, Defendants and Rose filed their Motion for Protective Order to Strike Ms. Rose's Deposition Testimony and to Disqualify the Law Office of Glen N. Lenhoff. They argued that Freifeld had violated Rose's attorney-client privilege and that she did not waive her privilege by answering Freifeld's deposition questions. Defendants and Rose requested that the Court suppress Rose's testimony, prevent that testimony from being disclosed to anyone or used in any legal or administrative proceedings, and bar Plaintiff's attorney or other counsel from inquiring into areas in which Rose asserts her attorney-client privilege at any other depositions, court or administrative proceedings.

Defendants and Rose additionally requested that the Court enter a protective order forbidding Freifeld from contacting Flint's managerial employees. The primary managerial staff member with which Freifeld was alleged to have had

improper communications was Gary Lee, one of Banner's former supervisors.

In opposition to the Motion, Plaintiff asserted that Rose waived her attorney-client privilege when she showed for her deposition and answered questions without objection. Plaintiff then argued that her attorneys should not be disqualified or sanctioned even if ethical violations occurred. Finally, Plaintiff opposed the request for a protective order and argued that her attorney's contact with Flint managerial staff was not improper.

Following oral argument, Magistrate Judge Thomas A. Carlson granted Defendants and Rose's request for a protective order, but denied their motion to strike or suppress Rose's deposition testimony and to disqualify Plaintiff's law firm. As for his decision to allow Rose's deposition to be used in this litigation, Magistrate Judge Carlson reasoned,

> Even if Ms. Rose subjectively believed her initial communications to attorney Freifeld were to be confidential, her subsequent voluntary appearance at a deposition, knowing that the deposition would be disclosed and used in this case, with no objection to the inquiries at or before the deposition, either to Mr. Freifeld or Defendant City's counsel, and with no attempt to seek other legal advice, constituted a voluntary waiver of any attorney-client privilege or other claim for confidentiality as to what she initially told Mr. Freifeld, and, further, that there is therefore no basis for disqualifying Plaintiff's counsel.

(Magistrate Judge Carlson's August 3, 2000 Order).

Since Magistrate Judge Carlson granted Defendants' request for a protective order pertaining to Flint's managerial staff, their Objections address only the denial of their request to have Rose's deposition testimony stricken and to have Plaintiff's attorneys disqualified.

C.

Fed. R. Civ. P. 72(a) authorizes this Court to set aside Magistrate Judge Carlson's Order if it is found to be "clearly erroneous or contrary to law." In this case, the Court finds that that portion of the Order denying Defendants' and Rose's request to strike her deposition, was clearly erroneous and, therefore, will set it aside.

Magistrate Judge Carlson's reliance upon the general rule -- that failing to object prior to the disclosure of privileged communication acts as a waiver to that privilege -- was misplaced. None of the cases cited by Plaintiff regarding waiver of the attorney-client privilege addressed the nuance of this case: *that the deposition examiner seeking to disclose the confidential information is the examinee's own attorney.*[2]

That distinguishable nuance is significant because Freifeld's actions, as alleged by Rose, constituted an ethical violation. It has been recognized that "an attorney who cross-examines former clients inherently encounters divided

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[2] Plaintiff cited *Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100 (S.D.N.Y. 2000); *Alexander v. F.B.I.*, 186 F.R.D. 21, 46 (D.D.C. 1998); *Franzel v. Kerr Mfg. Co.*, 234 Mich. App. 600, 600 N.W.2d 66 (1999); *Sterling v. Keidan*, 162 Mich. App. 88, 412 N.W.2d 255 (1987); *Steen v. First Nat. Bank*, 298 F. 36 (C.C.A.8 1924); and *Hurley v. McMillan*, 268 S.W.2d 229 (Tex. 1954).

loyalties." *U.S. v. Moscony*, 927 F.2d 742, 750 (3rd Cir. 1991). *Also see Pyle v. Meritor Savings Bank*, 1994 U.S. Dist. LEXIS 5408, 1994 WL 156707 (E.D.Pa.1994). Consequently, rules of professional conduct forbid such cross-examination without the client's clear consent.

Attorneys practicing in this Court are bound by the Michigan Rules of Professional Conduct (MRPC). E.D. Mich. Lr 83.20(j). MRPC 1.6 provides:

> (a) 'Confidence' refers to information protected by the client-lawyer privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
>
> (1) reveal a confidence or secret of a client;
>
> (2) use a confidence or secret of a client to the disadvantage of the client; or
>
> (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.
>
> (c) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;

(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;

(3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.[3]

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[3] Defendants and Rose cite MRPC 1.9, but the Court does not believe that that Rule is applicable. Rule 1.9 precludes a lawyer who has formerly represented a client from representing another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the

In this case, Freifeld obtained "confidences" as defined by MRCP 1.6(a); he was, therefore, precluded by the attorney-client relationship from divulging the information Rose disclosed to him, unless she gave her consent after full disclosure.

The essential elements of the attorney-client privilege, outlined as follows, were present.

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Fausek v. White, 965 F.2d 126, 129 (6th Cir. 1992). Freifeld's obligations under the attorney-client privilege were undiminished by the fact that Rose had only a preliminary consultation and never formally retained him. *Kearns v. Fred Lavery Porsche Audi Co.*, 745 F.2d 600, 603 (Fed.Cir. 1984).

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lawyer's former client unless the former client consents. That Rule pertains to situations in which the attorney is representing someone in an action against the former client. *See, e.g., In re Osborne*, 459 Mich. 360, 589 N.W.2d 763 (1999). In this case, Banner's action is not filed against Rose and the matter Rose consulted with Freifeld about -- Rose's own employment related complaints -- is not the same or a substantially related matter as Banner's claims of reverse discrimination. As a consequence, MRPC 1.6 is more applicable.

Freifeld also obtained "secrets" from Rose, i.e., information that Rose requested be held inviolate and, more clearly, information that had a high potential to cause embarrassment and be detrimental to Rose in her employment environment if disclosed. If Rose's allegations are credited, Freifeld violated MRCP 1.6(b)(3) by using Rose's confidential information and secrets to the advantage of Banner, as well as for his and/or his firm's monetary gain which would result from a recovery in the Banner matter.

That Freifeld would have violated MRCP 1.6 if he did not have Rose's consent, after full disclosure, to take her deposition and question her regarding Morolla's comments, is not in dispute. Freifeld admitted as much during the hearing. (Tr, 97).

Consequently, the Court finds that Magistrate Judge Carlson's Order was clearly erroneous. He failed to address Freifeld's possible ethical violations, focusing only on the question of whether Rose's failure to object at her deposition acted as a waiver to her attorney-client privilege.

While the attorney-client privilege can be waived by the person holding it, Plaintiff has cited no authority to suggest that a client, uninformed by her attorney concerning the availability of the privilege, can "knowingly" waive her privilege, particularly when the attorney questioning her is the attorney who had the obligation to inform her of the availability of the privilege. Nor has Freifeld cited any authority that would allow him to waive his client's privilege in the context of questioning her, when he has not clearly explained to her what the attorney-client privilege means, and when it can be asserted. Freifeld acknowledged to the Court at the November 3rd hearing that he never explained to Rose, the extent of the attorney-client privilege (Tr, 98). And, Rose

testified that she did not know she had a privilege to waive at the deposition (Tr, 21).

Regardless of the wishes of the parties litigating the Banner case, this Court has an independent interest and the inherent authority to enforce the rules of professional conduct. *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 749 (D.Md. 1997)("Federal courts have inherent authority to discipline attorneys who appear before them for conduct deemed inconsistent with ethical standards imposed by the court."). *Also see Morin v. Trupin*, 728 F. Supp. 952, 957 (S.D.N.Y. 1989).[4] Hence, Magistrate Judge Carlson erred in ignoring Freifeld's possibly unethical conduct and narrowly focusing on Rose's failure to object at her deposition.

D.

To determine whether Freifeld violated MRPC 1.6, the Court found it necessary to weigh the credibility of Freifeld and Rose at the hearing held on November 3, 2000, at which both Rose and Freifeld testified.

When making credibility determinations, a trial court must evaluate the demeanor of the witnesses as well as the internal consistency and plausibility of their testimony. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). After observing the demeanor of Rose and Freifeld, and considering the consistency and

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[4] Plaintiff has argued that the dispute arising out of Rose's deposition is moot due to the settlement between the parties. However, notwithstanding that settlement, the Court's independent interest and authority to enforce the rules of professional conduct with respect to matters before the Court deem the dispute not moot.

plausibility of their testimony, the Court finds Rose's testimony to be more credible.

At the outset, the Court will address Plaintiff's primary credibility argument. During the cross-examination of Rose, she was asked to clarify her testimony: Was she stating that the conversation Freifeld alleges took place at their first meeting regarding her deposition did not occur, or was she stating that she did not recall it? With a confused look on her face, Rose replied that she did not recall discussing a deposition. Plaintiff argues that, since Freifeld testified that he had a definite memory of Rose agreeing to the deposition, his testimony to that effect should be conclusive. The Court disagrees. On its face, it is highly implausible that Rose agreed to submit to a deposition but then forget about it. Such a decision would not be easily forgettable as a result of the possible consequences to Rose in her employment.

Further, viewing Rose's demeanor at the time of the line of questioning at issue, she appeared to be confused about the distinction Plaintiff's attorney was attempting to make. It appears to this Court that when Rose stated that she did not recall any discussion regarding a deposition that she meant that no such discussion occurred. This interpretation is bolstered by Rose's unambiguous testimony during her direct examination that Freifeld never even asked her to testify in a deposition.

Other testimony given by Rose, which the Court credits, is completely inconsistent with Freifeld's contention that Rose agreed to submit to a deposition. Rose testified that, when Freifeld asked her to sign an affidavit, she replied that she would have to give it serious consideration because she was already having employment related problems. Freifeld responded by telling Rose that if she was not part of the

solution she was part of the problem. He told her that she need not fear retaliation. However, in light of her existing employment problems, Rose felt that her supervisors would not hesitate to retaliate. She testified that she and Freifeld ended their meeting with her indicating that she would have to think about signing an affidavit. Subsequently, Rose decided against signing an affidavit, although she did not talk to Freifeld again.

Then, Rose was notified that Plaintiff's counsel had noticed up her deposition. Rose testified that her decision to submit to the deposition was not voluntary but was a requirement of her job. She also believed that Freifeld's questions would be confined to the circumstances surrounding Banner's filing of her stress claim. Rose continued to believe that Freifeld would keep confidential the information she had divulged to him during their consultation and was, therefore, shocked when the questioning began to mirror her discussion with Freifeld

Rose's testimony, as summarized above, defies Freifeld's claim that Rose agreed to participate in the deposition. Her credible testimony indicates that Rose walked out of his office with the question of whether to sign an affidavit on her mind. Since Rose's focus was on whether she should sign the affidavit, it is implausible that she had already agreed to submit to a deposition but then forgot about it. Even when she received the deposition notice, Rose did not know that Freifeld would question her with respect to the information she had divulged to him in confidence.

Adding to the Court's disbelief of Freifeld's testimony is his failure to produce any notes regarding his meeting with Rose in response to this Court's October 12, 2000 Order to provide such records for an in-camera inspection. Freifeld

testified that he could not find any notes upon a search of his office and, even more implausibly, that he did not recall whether or not he took notes.

The Court finds this assertion unbelievable for several reasons. First, it must be remembered that Rose was consulting with Freifeld to see whether she had a viable lawsuit. The Court speaks from experience when stating that a lawyer interviewing a potential client remains cognizant of the potential liability that can arise from even such an initial consultation. Accordingly, the Court finds suspect Freifeld's testimony that neither he nor his office had any recorded notation of his meeting with Rose whatsoever. Compounding this Court's suspicion is Freifeld's testimony that he was able to recall, strictly from memory, that February 4, 2000 was the date he met with Rose. The Court finds it more likely that Freifeld was able to identify that date on his affidavit after reviewing a note or record of her visit.[5]

Moreover, in response to this Court's inquiry, Rose testified that Freifeld took notes during their meeting, which she said lasted about two hours.[6] Freifeld agreed that the meeting may have been about two hours, although it may have been a little shorter. Given that time period and Freifeld's obvious reasons for having a keen interest in the content of

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[5] Freifeld first supplied that date on his affidavit, which was submitted before he knew that the Court would request his notes.

[6] Significantly, when Rose testified that Freifeld took notes, the relevance of the notes was probably not apparent to her. Freifeld was supposed to produce his notes to the Court for *in camera* review. As a consequence, there is no indication that Rose knew that Freifeld failed to produce any notes.

Rose's disclosures, the Court finds it implausible that Freifeld would not take notes or would forget having taken them.[7]

It is furthermore inconceivable that Freifeld would have been able to ask some of the specific questions posed to Rose during her deposition without having taken notes of their earlier meeting. For example, Freifeld asked, "Miss Rose, in March of 1999 did Mr. Morola [sic] give you a directive, an order to not piss off any black people until after the election." (Rose dep. at 17). Additionally, it was clear that Freifeld recalled Rose's claim that Morolla told her brother that she was a bitch and even that her brother's name is Greg Duckworth (Rose dep. at 21-23).

Even more troublesome was Freifeld's testimony that he often interviews witnesses to determine whether he will represent them, only to decide not to represent them but to use them, and the information they disclose, as evidence in other cases. Freifeld testified that he never gets written waivers from these individuals and he did not see the implication of MRPC 1.6 in engaging in such a practice.

Also, although never submitted in papers filed with the Court, or asserted to the Magistrate, Freifeld testified at the hearing that Rose waived the privilege in his office by

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[7] When the Court inquired whether Freifeld would not need to have notes in order to draft the affidavit of Rose that he requested, he replied that his usual custom is to have his witness sit beside him as he drafts that witness' affidavit on the computer. However, he also testified that some witnesses prefer to have their depositions taken. Under those circumstances, it is difficult to believe that any lawyer fail to takes notes during his or her interview of the witness in order to be prepared for the deposition.

agreeing to give a deposition. Having done that, Freifeld testified that Rose could never revoke the waiver.

> Once - in my opinion once it's waived, it's waived. It cannot be restored. (Tr, 99).

Previously, Freifeld had contended that Rose waived the privilege by failing to object at the deposition. That Freifeld now contends that it would have been fruitless for Rose to assert the privilege at the deposition, because she had irrevocably waived it in his office in February, stretches Mr. Freifeld's credibility beyond all bounds.

In summary, the Court finds that Rose's testimony was more credible than Freifeld's. She credibly testified that she was leery about divulging the information she had communicated to Freifeld because she feared retaliation. Also credible was her testimony that she believed that her disclosures to Freifeld would remain confidential unless she agreed to sign an affidavit and that she and Freifeld had not even discussed her submitting to a deposition. In contrast, Freifeld's demeanor, implausible testimony regarding his note-taking lead, and opinion concerning the irrevocable nature of an uninformed waiver of the attorney-client privilege, the Court to find his testimony incredible.

E.

In finding Freifeld's testimony to be incredible, the Court also relies upon other evidence that he has shown a disregard for the rules of professional conduct in this litigation. In particular, he has violated MRPC 4.2, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation

> with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

In comment, MRPC 4.2 also specifies:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. . . .

Freifeld has violated MRPC 4.2 by communicating with Gary Lee, one of Plaintiff's supervisors whom Banner alleged had engaged in discriminatory conduct toward her. Freifeld claimed at the hearing that Lee contacted him first, but that is irrelevant. *See Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1083 (S.D.N.Y. 1989)(Where the plaintiff initiated the contact with defendant's counsel that was found to be in violation of MRPC 4.2). He further admitted that he continued to communicate with Lee even after learning that he was a manager for Flint.[8] Freifeld's contention that he told Lee that he did not have to speak to Freifeld is unavailing. It was Flint, a party in this case, that stood to be damaged by Freifeld's violative communication with one of

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[8] Moreover, since Banner alleged that Lee acted discriminatory toward her, the Court finds suspicious Freifeld's claim that he did not even know who Lee was when they first spoke.

its managers. Freifeld did not seek or receive consent from Flint to speak to Lee in the absence of its attorneys.

Freifeld also spoke with Flint manager Linda Moore. At the hearing, he testified that he asked her whether she had the authority to hire or fire and, after she responded in the negative, proceeded his communication with her. Freifeld's inquiry into Moore's authority was inadequate. The test is not whether the manager has the authority to hire or fire. Rather, the comment to the rule refers to those who are managers, those whose actions may be imputed to the organization for purposes of liability or those whose statement may constitute an admission on the part of the organization. Indeed, "even lower grade employees can bind the employer if the employee is used for a certain function and the employee admits to matters concerning that function." *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 111 (M.D.N.C.1993).

Since Moore did not have any direct involvement in the events that led to this action and likely was incapable of making statement that would bind Flint, Freifeld communication with her did not necessarily violate MRPC 4.2. Notwithstanding, Freifeld's method of determining whether his speaking to Moore was unethical did not comport with MRPC 4.2 and displays a reckless attitude toward the rules of professional conduct.[9]

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[9] During the hearing before Magistrate Judge Carlson, Freifeld's boss, Glen Lenhoff, offered an even more limited definition of which corporate employees fall within 4.2. He argued that only managers that makes the employment decisions at issue in a case fall within the 4.2 proscription. Consequently, he stated that even a president or CEO of an organization who did not make the offending decision at issue could be contacted by opposing counsel without the presence of the organization's attorney (8/3/00 Tr. at

Equally revealing of Freifeld's attitude was Rose's credible testimony that he told her that she would be part of the problem in Flint if she was not part of the solution. In other words, for the benefit of the Banner case, Freifeld pressured Rose to expose the information she had conveyed to him in her effort to receive legal advice. Furthermore, Freifeld testified that, although he does not admit that Rose raised concerns about retaliation, he would not have been concerned about encouraging her to testify even if she had. He said that he would simply tell her about the laws against retaliation. Nevertheless, MRPC 1.6 forbids an attorney from disclosing secrets that would embarrass or be detrimental to the client for the benefit of another party. Although laws may prohibit some forms of retaliation, that does not mean that such retaliation would not occur or that she would not otherwise suffer some embarrassment or detriment. Both Rose's and Freifeld's testimony reveal that he harbored an utter lack of concern for whether Rose's confidential disclosures would embarrass or be detrimental to her once publically disclosed. Freifeld's effort to pressure Rose to publicly disclose her confidential communication for the benefit of the Banner case violates the spirit, if not the letter, of MRPC 1.6.

F.

As a result of this Court's finding that Freifeld did not have consent to depose Rose about the disclosures she had made to him regarding Morolla, the Court concludes that

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36-37). Since such a president or CEO would have the power to hire or fire, Lenhoff's view of an off-limits manager is even more limited than Freifeld's. Like his associate, Lenhoff exhibits a neglect of his obligations under the rules of professional conduct.

Freifeld violated MRPC 1.6. As a result, the Court will impose remedies and sanctions as follows.

Under these circumstances, the striking of Rose's deposition from the record is appropriate. The suppression of tainted evidence is within the court's supervisory authority to apply rules of professional conduct. *Morin, supra.*, at 957. Thus, in *Upjohn Co. v. Aetna Cas. and Sur. Co.*, 768 F. Supp. 1186, 1212 (W.D.Mich. 1990), the court upheld the magistrate judge's decision to deem inadmissible any information that was unethically obtained. Likewise, in *Massa v. Eaton Corp.*, 109 F.R.D. 312, 315 (W.D.Mich. 1985), the court ordered that evidence obtained through unethical *ex parte* communications with managerial level employees of the defendant would be inadmissible at trial. Accordingly, the Court will grant Defendants and Rose's request to strike her deposition from the record.

Further, to prevent further harm to Rose and to prevent Plaintiff's counsel and others from further benefitting from Freifeld's ethical violation, the Court will enjoin Plaintiff's attorney from distributing the deposition to anyone else; from disclosing the contents of the deposition to anyone else; and, from deposing Rose on any matters that were the subject of her March 7, 2000 deposition. Finally, the Court will enjoin the use of the Rose's deposition in any other legal or administrative proceedings by any attorney.

The court's supervisory authority also authorizes it to discipline Freifeld for his ethical violation. *Zachair, supra.* at 749.[10] As a result of Plaintiff's counsel's flagrant disregard

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[10] One type of discipline that is often contemplated is the disqualification of the offending attorney. *See, e.g., Plant Genetic*

of their ethical obligations, the Court will impose a monetary sanction of $5,000, on Freifeld and his law firm, payable to the Clerk of the Count immediately

Additionally, the Court orders Freifeld and the law office of Glenn Lenhoff to pay Brian Kreucher and his law firm, $15,000 in fees and costs, which is only a portion of the amount incurred by the City of Flint in litigating this matter regarding Vicki Rose.

Further, Freifeld and his firm are ordered to pay H. William Reising the sum of $5,000 for his representation of Vicki Rose.

Finally, pursuant to E.D. Mich. Lr 83.22(c)[11], the Court will refer Plaintiff's counsel to the Michigan Attorney Grievance Commission for an investigation.

Systems, N.V. v. Ciba Seeds, 933 F. Supp. 514, 517 (1996)(citations omitted). In *Papanicolaou, supra.* at 1083, the court emphasized that "a violation of professional ethics rules does not alone trigger disqualification, rather, a trial judge should primarily assess the possibility of prejudice at trial that might result from the attorney's unethical act." In this case, there will be no trial because the Banner dispute has been settled. As a consequence, there is no possibility of prejudice at trial that would justify a decision by this Court to disqualify Freifeld or the Lenhoff law firm. The Court will therefore deny Defendants and Rose's request to disqualify Plaintiff's attorneys.

[11] Rule 83.22(c) states, "When misconduct or allegations of misconduct that, if substantiated, would warrant discipline of an attorney who is a member of the bar of this court . . . come to the attention of a judge, whether by complaint or otherwise, the judge may refer the matter to the Michigan Attorney Grievance Commission for investigation and prosecution."

G.

Before concluding this Opinion, the Court feels compelled to address two other arguments offered by Plaintiff. First, Plaintiff repeatedly emphasized at the hearing that Flint did not act quickly or aggressively enough to bring the allegations against Freifeld to the attention of the Court. Lost in this argument is any appreciation that it was Freifeld who was Rose's attorney when the communication was made, and that it was he who had the obligation to assure that Rose's confidential communication to him did not come to light without her consent. Any delay in addressing this matter by Flint and its attorneys does not lessen the gravity of Freifeld's ethical violation.

Plaintiff's counsel also emphasizes that Freifeld and the Lenhoff firm have never been disciplined for ethical violations. In light of the conduct of Freifeld and his firm during this litigation, such discipline is likely overdue.

H.

For the reasons stated above, **THE COURT HEREBY GRANTS IN PART AND DENIES IN PART** Defendant's and Rose's Objections to the Magistrate Judgment's August 3, 2000 Recommended Order on Defendant's Motion for Protective Order to Strike Intervenor Vickie Rose's Deposition Testimony and to Disqualify the Law Office of Glen N. Lenhoff **[document 30 and 47]; STRIKES** Vickie Rose's March 7, 2000 deposition; **ENJOINS** Plaintiff's counsel from distributing the deposition to anyone else; **ENJOINS** Plaintiff's counsel from disclosing the contents of the deposition to anyone else; **ENJOINS** Plaintiff's counsel from deposing or cross-examining Rose on any matters that were the subject of her March 7, 2000 deposition; **ENJOINS**

the use of the Rose's deposition in any other proceedings by any attorney; **ORDERS** Freifeld and the Lenhoff firm to pay: $5,000 in sanctions to the Court; $15,000 in fees and costs to Brian Kreucher and the law firm of Keller, Thoma, Schwarze, Schwarze, Dubay & Katz, P.C.; and, $5,000 to H. William Reising and the law firm of Plunkett & Cooney. Finally, the Court **DENIES** Plaintiff's Motion for Reconsideration **[document 64].**

Dated: 12/18/00

VICTORIA A. ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX F

Affidavit of Glen N. Lenhoff

I, Glen N. Lenhoff, being first duly sworn depose and make the statements in this Affidavit. I make my statements in this Affidavit based on personal knowledge having observed the facts that I state herein. I will testify to the truth of these statements in open Court if called upon to do so.

1. I was admitted as a practicing attorney in the State of Michigan in the summer of 1981. My first job as an attorney was that of Judicial Law Clerk to the Honorable Stewart A. Newblatt of the United States District Court for the Eastern District of Michigan. I clerked for Judge Newblatt until August of 1984.

2. After my Federal Court law clerkship ended, I went into private practice specializing in the litigation of civil rights cases. I have practiced continuously in this area to the present day. I almost always have represented the Plaintiff in these cases. One type of discrimination case that I handle is the so called "reverse discrimination" case.

3. My law office represented Plaintiff Elizabeth Banner in the case of Elizabeth Banner v City of Flint., No. 99-74600 (E.D. Mich.). This lawsuit originally was assigned to Judge Paul D. Borman of the United States District Court for the Eastern District of Michigan. On or about September 5, 2000, the Banner case was re-assigned from Judge Borman to United States District Judge Victoria A. Roberts.

4. On June 27, 2000, the City of Flint filed a motion to disqualify my law office as Plaintiff's counsel in the Banner case based on allegations of improper conduct allegedly committed by an associate in my law firm named Michael E. Freifeld. On June 28, 2000, Judge Borman referred this motion to Magistrate Judge Thomas A. Carlson. On August 3, 2000, Magistrate Judge Cadson issued an Order resolving the motion. Magistrate Judge Carlson declined to assess any costs or sanctions in the Order. Defendants filed timely objections to Magistrate Judge Cadson's Order.

5. Brian Kreucher represented the Defendants in the Banner case.

6. On October 9, 2000, Kreucher and I agreed to settle the Banner case for $130,000.00.

7. On October 10, 2000, Freifeld and I went to Detroit for a status conference in a different reverse discrimination lawsuit - the case of Gale v City of Flint, No. 00-70412 (E.D. Mich. Judge Victoria A. Roberts). It was just a coincidence that Gale also was assigned to Judge Roberts. My understanding with Kreucher was that Kreucher would hand me the Banner settlement documents outside Judge Roberts' Chambers on October 10, 2000 prior to the Gale status conference.

8. Thus, on October 10, 2000, Kreucher and I exchanged the Banner settlement documents and waited to be called into Judge Roberts' Chambers for the Gale status conference. Shortly thereafter, Kreucher, Freifeld and I were indeed called into Judge Roberts' Chambers. The three of us sat in the waiting area inside of Judge Roberts' Chambers, but outside of her office.

9. Kreucher, Freifeld and I were then called into Judge Roberts' office. The four (4) of us sat at a conference table.

10. We immediately informed Judge Roberts that Banner had settled. Judge Roberts then told us that she was informing her law clerk that Banner had settled, so that the law clerk would not work any further on the pending Banner summary judgment motion. Judge Roberts then left the office room to go to a different room to tell her law clerk of the settlement.

11. Judge Roberts then returned to the office room and sat down at the conference table at which Kreucher, Freifeld and myself were seated. Judge Roberts then began discussing the Gale case. In addition to discussing dates in Gale, Judge Roberts made negative comments about the Gale case.

12. After approximately ten (10) minutes of discussing Gale, Judge Roberts told Freifeld and I to leave the office room.

13. Freifeld and I then left the Office room and sat in the waiting area several feet away from Judge Roberts' closed office door. We could not at all hear what Judge Roberts was saying. Thus, Judge Roberts and Kreucher were in Judge Roberts' office with the door closed.

14. Having litigated many cases in Federal Court and State Court, I realize Judges often try to settle cases by asking one attorney to leave the room while they explore settlement with the other attorney. This is what I thought was happening in Gale. I thought Judge Roberts was proposing that Kreucher make a nominal early settlement offer in Gale.

15. Freifeld and I sat outside Judge Roberts' office for approximately 10 minutes. The door then opened, and Judge Roberts told us to return into her office.

16. To my utter shock, Judge Roberts stated that she had been talking to Kreucher about the Banner allegations against Freifeld.. Judge Roberts stated that she had asked Kreucher whether he had filed a grievance with the Michigan Attorney Grievance Commission over this matter.

17. Judge Roberts stated that she thought Freifeld's conduct was "outrageous" and that the entire matter should go to the Michigan Attorney Grievance Commission.

18. I told Judge Roberts that the Banner case was settled, and that we had even entered into a Stipulation as part of the settlement concerning Magistrate Judge Cadson's August 3, 2000 Order. Judge Roberts then stated that she would look into the Freifeld matter further.

19. While the length of time that Judge Roberts talked to the four of us after she called Freifeld and I back into the room was only about 5 minutes, her hostility was unmistakable.

20. On October 12, 2000, Judge Roberts issued an Order setting an evidentiary hearing for November 3, 2000 on the Defendants' objections to Magistrate Judge Carlson's August 3, 2000 Order.

21. In the wake of the October 10, 2000 Gale status conference, Kreucher seemed to be waffling on the settlement. I was worded that Kreucher would back out of the settlement. I believed Kreucher would do this in light of what had occurred at the Gale status conference. Thus, on or about

October 24, 2000, I filed a motion to compel specific performance of the Banner settlement.

22. The days between October 10, 2000 and November 3, 2000 were very painful for me. I agonized over whether a motion to disqualify Judge Roberts should be filed based on what had occurred on October 10, 2000 at the Gale status conference. I will never forget the Gale status conference. The Gale status conference, so shocking to me, remains etched in my memory. I will state, however, that I prepared a motion to disqualify Judge Roberts and signed the motion on November 2, 2000. The motion recounts what occurred at the Gale status conference. The date on the motion is November 2, 2000, I do not need a writing to refresh my recollection as to what happened on October 10, 2000 at the Gale status conference. Nevertheless, I do have such a writing in the form of the November 2, 2000 motion which remain un-filed in my office.

23. It is a difficult decision to file a motion to disqualify any Judge - especially a Federal Judge. What made the decision especially difficult in Banner was that I did not want to do anything to jeopardize the completion of the $130,000.00 settlement in favor of my client Elizabeth Banner. Thus, after agonizing over this decision, I decided not to file the motion to disqualify Judge Roberts.

24. There is a written Record of what occurred at the November 3, 2000 Evidentiary Hearing in Banner. Furthermore, of course, on December 18, 2000, Judge Roberts issued an Opinion reversing Magistrate Judge Carlson in part and imposing $25,000.00 in sanctions. I promptly paid the $5,000.00 in sanctions to the Clerk of the Court as ordered by Judge Roberts. I promptly contacted Kreucher and Bill Reising (the intervenor's attorney) and placed into

escrow the other $20,000.00 in sanctions pending disposition of an appeal of Judge Roberts' December 18, 2000 Order. Then, on January 12, 2001, my law office and Freifeld filed a Notice of Appeal, and thus our appeal of Judge Roberts' December 18, 2000 Order is now pending in the United States Court of Appeals for the Sixth Circuit.

25. Within a few days of the Gale status conference, I talked to Tom Pabst. I told Mr. Pabst just what had occurred at the Gale status Conference. Mr. Pabst told me that he felt that I should file a motion to disqualify Judge Roberts. Again, I eventually decided against taking such a course of action.

26. Now, Tom Pabst has asked me for an Affidavit detailing what occurred at the Gale status conference. I see no good reason why I should refuse this request. Thus, I will provide Mr. Pabst with this Affidavit.

27. The statements made in this Affidavit are based on my personal knowledge. I would testify to the truth of the statements in this Affidavit in open Court if called upon to do so.

Dated 1/31/2001

/s/
Glenn N. Lenhoff (P32610)

Sworn to before me this
31st day of January, 2001, in Flint, Michigan

/s/
Candy E. Vanek, Notary Public